spective of ownership, and shall pay to the Industry the
68 sum of $425.00 per month in consideration for which the Industry shall and by this instrument does grant to the Railroad (a) the use and occupancy of its lands by any and all tracks or portions thereof located thereon belonging to the Railroad and such adjacent land as may be necessary for the ordinary use and occupancy of said tracks, and (b) the uninterrupted use and occupancy of any and all tracks belonging to the Industry and located on its land, together with such adjacent land as is necessary for the ordinary use and occupancy of said tracks for the transportation of any and all traffic, provided that such Industry owned tracks shall not be used or occupied for the purpose of transporting livestock to or from any place, establishment or facility except the Industry or in such a way as to unduly interfere with the Industry's business. In event said Industry owned tracks are used for said hereinabove described competitive traffic the charge therefor shall be the subject of a separate agreement.

All of said tracks are shown on the blueprint attached hereto and made a part hereof, entitled "Land and Tracks at Cleveland Union Stock Yards, Cleveland, Ohio, June 16, 1943—44173–11–P–7, on which tracks owned by the Railroad are colored red and tracks owned by the Industry are colored yellow.

Third: Said Section Sixth in said agreement of June 16, 1924, shall be and is hereby changed and modified, effective as of July 1, 1943, to read as follows:

"Sixth. This agreement shall terminate six months after written notice by registered mail has been sent by either party to
69 the other to that effect; in the event such mail notice is returned undelivered notice by the Railroad may be given by posting it upon a conspicuous part of the premises and this agreement, in such case, shall terminate six months after such notice is given, after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided."

In Witness Whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
Lessee of The Cleveland, Cincinnati,
Chicago & St. Louis Railway Company,
By W. F. SCHAFF.

THE CLEVELAND UNION STOCK
YARDS COMPANY,
By (S) A. Z. BAKER, *President.*

Approved as to form

W. N. KING,
General Attorney,
The N. Y. C. R. R. Co.

FFR.

70 *Exhibit "E" to Complaint*

THE CLEVELAND UNION STOCKYARDS CO.
CLEVELAND, OHIO

NOVEMBER 15th, 1946.

A. Z. BAKER,
President and Gen. Mgr.
PHILIP H. COAD,
Secretary and Treasurer.
MR. R. R. PIERCE,
Gen. Atty., The New York Central Railroad Co.,
1324 W. 3rd St., Cleveland, Ohio.

DEAR SIR: For a number of years The Cleveland Union Stock Yards Company has by conventional sidetrack agreements granted to The New York Central Railroad Company and predecessors the use of the industrial sidetracks owned by the Stock Yards Company and serving its stockyards, for such purposes as storing and switching cars and the movement of carload freight to and from Swift & Company and other packers located adjacent to the stockyards property.

By an agreement of February 1st, 1935, amending an agreement of June 16th, 1924, The Cleveland Union Stock Yards Company restricted the use of its tracks for competitive traffic (meaning livestock delivered other than through its stockyards). By further supplemental agreement of July 1st, 1943, the Stock Yards Company granted to the Railroad Company "the uninterrupted use and occupancy of any and all tracks belonging to the Industry and located on its land, together with such adjacent land as is necessary for the ordinary use and occupancy of said tracks, for the transportation of any and all traffic, provided, that such Industry-owned tracks shall not be used or occupied for the purpose of transporting livestock to or from any place, establishment or facility save the Industry, or in such a way as to unduly interfere with the Industry's business. In the event such Industry-owned tracks are used for the heretofore described competitive traffic, the use therefor will be the subject of a separate agreement."

The Stock Yards Company is engaged in the business of handling, storing, and delivering livestock, including livestock con-

signed direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering nonstockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the Railroad Company for delivery to packers through its stockyards. The charges for the use of these facilities in the delivery of livestock, when such delivery is made within 24 hours, average $3.73 per car. If livestock should be diverted from the pens of the Stock Yards Company for delivery by the use of its sidetrack, it would deprive the Stock Yards Company of compensation for the facilities, which would as a consequence remain idle. The Company could not long remain in business under such circumstances.

71 The Stock Yards Company has been willing to permit the use of its tracks for the movement of freight other than livestock, since that does not unduly interfere with its business. The Interstate Commerce Commission, in Docket 28714, Swift & Company vs. Baltimore & Ohio R. R. Co., et al., in which the Stock Yards Company is held to be a proper party defendant has condemned the agreement between the Stock Yards Company and the Railroad Company because it attempted a special exception as to livestock, which the Commission considered to be an abrogation of the obligation placed upon the railroad by the Interstate Commerce Act. The Commission also condemned the singling out of livestock for special compensation, and the collection by the Stock Yards Company or the payment by the Railroad Company of either yardage charges or any other amount of special compensation, which the Commission considered in effect a demand from the Railroad or a penalty for observing its tariff and other duties under the law, pointing out that "whatever may be the Stock Yard's right to altogether withdraw this track from public use * * * it may not, so long as contracting for its public use, exact compensation on any such basis."

Elsewhere in the Commission's decision, the Commission said, "Whatever may be the right of the Stock Yard Company to altogether withdraw its track from public use * * * the attempted special exception as to livestock could not and has not changed the common carrier status of New York Central Spur No. 245." The Commission found that "Track 1619 (owned by the Stock Yards Company) is now and for years has been devoted to a public use." There is no finding by the Commission that the track had been dedicated to public use in such manner as to create a perpetual easement or prescriptive right in the public, in the railroads, in Swift & Company, or in any other individual firm or

corporation. The Commission recognized the fact that the use had been entirely under contract. There is, of course, a marked distinction between "devoted to public use" and "dedicated to public use." The former is temporary and subject to withdrawal—the latter is fixed and permanent. The Cleveland Union Stock Yards Company has not desired and does not now desire nor intend to create a permanent use of its track and the land occupied thereby. The particular track extends along West 65th Street in the City of Cleveland, Ohio, and occupies the most valuable land frontage owned by the Stock Yards Company. That property and the business of The Cleveland Union Stock Yards Company must be protected. The Commission's decision apparently makes it necessary to withdraw the use of so-called track No. 1619 (or No. 245) by the Railroad for the purpose of serving Swift & Company or other plants similarly situated. The decision seems to recognize the lawful right of the Stock Yards Company to altogether withdraw its track from this use.

The supplemental agreement of July 1st, 1943, provides, "Sixth. This agreement shall terminate six months after written notice by either party to the other to that effect, such notice on the
72 part of the Railroad shall at its option be given by posting it on a conspicuous part of the premises, and this agreement shall terminate six months after posting, after which period either party may remove all property belonging to it under this agreement except as herein otherwise provided."

For reasons herein set forth, The Cleveland Union Stock Yards Company under and by virtue of the termination provision set forth above, hereby notifies you that the said side track agreement of June 16th, 1924, as amended February 1st, 1935, and further amended July 1st, 1943, is terminated as of midnight of the 16th day of May, 1947, after which you shall make no further use of said sidetrack for the transportation of freight of any kind or nature to Swift & Company or other industries similarly situated which have heretofore enjoyed transportation service by means thereof.

Yours very truly,

THE CLEVELAND UNION
STOCK YARDS CO.,
By (Sgd.) A. Z. BAKER,
President & General Manager.

AZB–W.

Receipt of this letter is acknowledged this 15th day of November 1946.

Chief Assistant General Attorney,
The New York Central Railroad Company.

73 In United States District Court

Civil No. 24435

[Title omitted.]

Answer of the United States

Filed Jan. 20, 1947

Now comes the United States of America, defendant in the above-entitled civil action, and for answer to the Bill of Complaint filed herein by plaintiffs on November 20, 1946, joins in and adopts the Answer heretofore filed by the Interstate Commerce Commission.

Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.

Don C. Miller,
DON C. MILLER,
United States Attorney.

74 CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the attached answer was served on January 16, 1947, upon each of the other parties to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Dwight D. Buss, Esquire, Counsel, Baltimore & Ohio Railroad Company, 1956 Union Commerce Building, Cleveland, Ohio; George H. P. Lacey, Esquire, Counsel, Pennsylvania Railroad Company, 1857 Union Commerce Building, Cleveland, Ohio; Willis T. Pierson, Esquire, Law Department, Erie Railroad Company, Midland Building, Cleveland, Ohio; John A. Duncan, Esquire, Wheeling and Lake Erie Ry. Company, 1669 Union Commerce Building, Cleveland, Ohio; Robert R Pierce, Esquire, Chief Assistant General Attorney, New York Central Railroad Company, 1324 W. Third Street, Cleveland, Ohio; Edward M. Reidy, Esquire, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C., Ross Dr. Rynder, Esquire, John P. Staley, Esquire, Attorneys for Swift & Company, Intervenor, 4115 Packers Avenue, Chicago 9, Illinois.

Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

JANUARY 16, 1947.

75 In United States District Court

Civil No. 24435

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 10, 1947

The Interstate Commerce Commission, hereinafter called the Commission, a defendant in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraph (a) of section I of the complaint, the Commission admits that the suit is brought by plaintiffs to enjoin and set aside the report and orders therein referred to and admits that the copies of said report and orders, annexed to the complaint as Exhibits A, B-1, B-2, and B-3, are correct, except that it says that a copy of the Commis-
76 sion's order of May 3, 1946, not having been made a part of the complaint, is attached to this answer as Exhibit 1, to which the Commission refers the Court.

Answering the allegations of paragraph (b) of section I of the complaint, the Commission denies any "unlawful effect" of its order therein referred to.

Answering the allegations of paragraph (c) of section I of the complaint, the Commission alleges that the present effective date of its order of May 3, 1946, as extended from time to time, is February 28, 1947, upon "not less than 5 days' notice."

II

Answering the allegations of sections II, III, and IV, of the complaint, the Commission admits the allegations thereof.

III

Answering the allegations of section V of the complaint, the Commission refers the Court to the complaint of Swift & Company, complainant before the Commission, for a more full, complete and accurate statement of the position of that Company than is contained in said section V.

IV

Answering the allegations of section VI of the complaint, the Commission admits that the position of plaintiffs was substantially as set forth in said section VI, but denies that said section VI, or the separate paragraphs thereof, adequately or correctly summarizes the facts of record in said proceeding before the Commission. For a more full and complete statement of the facts and contentions made by the respective parties, including plaintiffs herein, to the Commission, the Commission respectfully refers the Court to its said report of May 3, 1946, attached
77 to and made a part of the complaint as Exhibit A, to which reference is hereby made. The Commission further avers that said decision and findings of the Commission are based upon all of the facts of record in said proceeding and that said decision is valid ans lawful and its findings and conclusions are sustained by substantial evidence.

Answering further the allegations of section VI of the complaint, the Commission avers and alleges that the portion of track therein referred to as owned by the Cleveland Union Stockyards Company is a part of the tracks of the New York Central Railroad Company, operated by the latter subject to the provisions of the Interstate Commerce Act; that, under contracts with the said Stock Yards, the New York Central has for years used, and still is using, the track as part of its railroad and terminal facilities at Cleveland; that the agreed, as well as actual, use, has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's terminal track by which it renders common carrier switching service to and from the plant of Swift & Company and the several other plants and industries served thereby; that, while by amendment to the contracts made in 1935, restrictions, or conditions, were specially imposed as to the carriage of livestock, the use of the Stock Yard's track for all other traffic was continued just as formerly; that the Stock Yards, in contracting with the New York Central, presumably knew that it was dealing with a common carrier subject to regulatory laws; and that, as stated in the Commission's report (p. 65), "To say that the Stock Yards, while granting the use of its track 1619 generally for common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates."

78 V

Answering the allegations of section VII of the complaint, the Commission refers the Court to its order of May 3, 1946, attached to and made a part of this answer as Exhibit 1, for more full and complete information concerning its requirements than is contained in said section VII. The Commission further avers, in answer to the allegations of this section, that the order is presently effective on February 28, 1947, on not less than 5 days' notice, and not on November 30, 1946, as set forth in said section VII.

VI

Answering the allegations of paragraphs (a) to (d) (first paragraph), inclusive, of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (1) (a) of section VIII of the complaint, the Commission denies the same. In this connection the Commission alleges and avers that the Cleveland Union Stock Yards Company was a defendant in the proceedings before the Commission and is bound by the terms of the order the same as any other defendant named therein, including plaintiffs.

Answering the allegations of paragraph (d) (1) (b) of section VIII of the complaint, the Commission denies the same. In this connection the Commission alleges and avers that the evidence of record in the proceedings before it, as well as its report in said proceeding, Exhibit A to the complaint, shows that the said 1,619 feet of track is maintained and operated by the New York Central Railroad Company, one of the plaintiffs herein. In this

79 connection, the Commission alleges and avers that, under the conditions established in the proceedings before it and set forth in its report of May 3, 1946, to which reference has hereinbefore been made, it is the lawful duty of plaintiffs herein, and of said Cleveland Union Stock Yards Company, to comply with said order of the Commission, it being a lawful order.

Answering the allegations of paragraph (d) (1) (c) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (1) (d) of section VIII of the complaint, the Commission is without knowledge or information sufficient to form a belief as to the truth of the facts therein contained, the notice referred to having been issued after the close of the proceedings before the Commission. Further answering the said allegations, the Commission says that, in performing its duties of regulating rates, practices, and service, it is constantly dealing with railroad lines or trackage, both road-haul

and terminal, that include trackage held under lease, or trackage agreements, and where, too, the leases, or agreements, may contain a provision for termination upon specified notice, or the termination date may be within the comparatively near future; that it may not, because of such considerations, abdicate its duties but must enforce the Act's provisions under the existing conditions as to leasehold or trackage rights; that, similarly here, while the agreement between the Stock Yards and New York Central contained a clause authorizing termination by either party upon 60 days' notice, this did not afford excuse for permitting continuance of the violations of the Act shown; nor did it obligate the Commission to attempt to anticipate what the parties might in the future do under the termination clause, or as to just what were their rights in that respect.

80 Answering the allegations of paragraph (d) (1) (e) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (2) of section VIII of the complaint, the Commission denies the same and refers the court to its report and order of May 3, 1946, for more full and complete information concerning its finding and conclusions.

Answering the allegations of paragraphs (d) (2) (a), (b), and (c), of section VIII of the complaint, the Commission denies the truth of each and every allegation therein contained, except insofar as said paragraphs constitute mere excerpts from the report of the Commission in said proceeding. The Commission further avers that the allegations of said paragraphs are merely argumentative and not proper parts of the complaint herein.

Answering the allegations of paragraph (d) (2) (d) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (3) of section VIII of the complaint, the Commission denies the same, and avers that said paragraph is purely argumentative and that the decisions cited therein in nowise relate to delivery of livestock or other traffic to the plant of Swift & Company at Cleveland, Ohio.

Answering the allegations of paragraph (d) (3) (a) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (3) (b) of section VIII of the complaint, the Commission denies the same. In this connection, the Commission avers that failure of defendants to comply with said order of the Commission would subject Swift & Company to undue prejudice and disadvantage, as found by the Commission in its report of May 3, 1946, and that such

81 questions are administrative in nature, within the sole authority of the Commission to make findings with respect thereto.

Answering the allegations of paragraphs (d) (4) (a), (b), and (c) of section VIII of the complaint, the Commission denies the same. In this connection the Commission avers that the question of violation of section 3 of the Act is primarily administrative and committed to the Commission's determination; that the Stock Yards, in contracting with the New York Central for the use of the track referred to, was dealing with a common carrier subject to regulatory laws; that whatever the Stock Yards' right to altogether withdraw its track from public use (which question was neither involved nor decided), it could not, while continuing to grant the use thereof generally for public service, single out particular traffic and, under the guise of a contract restriction or condition, force the railroad to refuse to switch and make delivery of such traffic as billed and as was its duty under the Act, or, in the alternative, to pay a special charge set up as in effect penalty for observing its tariffs and other duties under the laws to which it was subject; that that was not a lawful exercise by the Stock Yards of its rights in the track; that the railroad's acquiescence therein did not change this; that, therefore, the Stock Yards' asserted right to impose such special restrictions was not a cir-

82 sumstance which, as matter of law, rendered substantially different the circumstances and conditions in switching and making delivery of livestock to the plant of Swift & Co., than were the circumstances and conditions in rendering like service to its competitors; and that, consequently, since no lawful condition within the right of the Stock Yards to impose precluded the railroad from rendering such service for Swift & Co., it is obvious that the question of whether its failure to do so was unduly prejudicial was left as a purely administrative question committed to the judgment and determination of the Commission.

Answering the allegations of paragraphs (d), (5), (6), (7), (8), and (9), the Commission denies the same. The Commission further denies that its said report and order of May 3, 1946, is invalid for any of the reasons set forth in said paragraphs, or for any other reason or reasons.

Further answering the allegations of the complaint, the Commission admits and alleges that it made and entered the report and order of May 3, 1946 (266 I. C. C. 55), referred to in section I of the complaint and made a part thereof as Exhibit A, in a proceeding then pending before it, entitled Docket No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Company et al., follow-

83 ing complaint filed with it on September 5, 1941, by Swift & Company as alleged in section V of the complaint; that thereafter answers were filed to said complaint by some of the defendants named therein; that thereafter the proceedings came on for formal hearing at Cleveland, Ohio, on April 22, 1942,

before Examiner Carter, at which hearing much oral testimony and other evidence in the form of exhibits was introduced by the respective parties; that thereafter briefs were filed by the parties with the Commission in support of their respective contentions; that thereafter, on or about April 1, 1943, a proposed report was served by Examiner Carter, recommending dismissal of Swift & Company's complaint, to which exceptions were filed by Swift & Company and a reply to said exceptions filed by the railroad defendants in the proceedings; that thereafter oral argument was had before the Commission on June 4, 1943; that by order of June 14, 1943, the proceeding was reopened for further hearing by the Commission whereupon further hearings were held before Examiner Haden at Cleveland on June 22, 1944, at which much further oral testimony and other evidence in the form of exhibits was introduced; that thereafter briefs on the rehearing were filed with the Commission by complainant, Swift & Company, and the railroad defendants; that thereafter, on or about May 26, 1945, a proposed report was served by Examiners Haden and Banks, again recommending dismissal of the complaint of Swift & Company, to which exceptions were filed by Swift & Company, and replies to said exceptions were filed by defendants railroads and defendant Cleveland Union Stock Yards Company; that thereafter the case came on for reargument before the Commission on October 3, 1945, following which the Commission made and entered and served upon all parties to said proceedings its said report of May 3, 1946, and its said order of the same date. The Com-

84 mission further alleges that following the issuance of said report and order of May 3, 1946, petition for reconsideration was filed with the Commission by defendant, Cleveland Union Stock Yards Company, to which a reply to said petition was filed by Swift & Company, and subsequently petition for reconsideration of said decision of May 3, 1946, was filed with the Commission by the railroad defendants in said Docket No. 28714, to which full reply was made by complainant, Swift & Company, following which the entire Commission, by order of October 7, 1946, denied said petitions for reconsideration filed by railroad defendants and defendant Cleveland Union Stock Yards Company. The Commission further alleges that by subsequent orders said order of May 3, 1946, had been from time to time extended so that its present effective date is February 28, 1947, on five days' notice.

The Commission admits and alleges that in said proceedings the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order were submitted to the Commission for

consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiffs herein, its said report and order of May 3, 1946, 266 I. C. C. 55, annexed to and made part of the complaint as Exhibit A; that
85 said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its order of May 3, 1946, was based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and conditions called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of May 3, 1946, were not mad or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause, plaintiffs either irreparable damage or any damage if said report and order are not enjoined.

For a further defense herein, defendant Commission alleges that the Cleveland Union Stock Yards Company was a defendant
86 in said proceeding before the Commission, having been made so under the provisions of U. S. C. A. title 49, § 42; that said order of the Commission applies to said Cleveland Union Stock Yards Company to the same extent and subject to the same provisions of law, including penalties, as it applies to plaintiffs in this complaint; and that said Cleveland Union Stock

Yards Company may not lawfully disobey said order or aid, abet, or induce disobedience to said order by the plaintiffs herein.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order referred to and made a part of the complaint as Exhibit A, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY,
Assistant Chief Counsel.
GORDON C. LOCKE,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

87 [*Duly sworn to by J. Haden Alldredge; jurat omitted in printing.*]

88 *Exhibit 1 to Answer*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May, A. D. 1946

No. 28714

SWIFT & COMPANY
v.

THE BALTIMORE AND OHIO RAILROAD COMPANY; ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES); THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE WHEELING AND LAKE ERIE RAILWAY COMPANY; THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been

made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August, 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipment of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] (S) W. P. BARTEL, *Secretary.*

89 In the United States District Court

Civil No. 24435

(Title omitted.)

Answer of Swift & Company, intervener

Filed Jan. 20, 1946

Now comes Swift & Company, hereinafter referred to as the intervener, and, for its separate answer to plaintiffs' complaint herein, alleges and says:

I

(a) Intervener admits the allegations contained in section I (a) of the complaint.

(b) Intervener admits so much of the allegations of section I (b) of the complaint as avers that a copy of the report and order of the Interstate Commerce Commission (hereinafter called the Commission) in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55, are appended to the complaint; but denies that sections VII and VIII of the complaint set forth any unlawful effect of said order of the Commission.

(c) Intervener admits the allegations of section I (c) of the complaint, except that intervener avers that, by its order of November 22, 1946, the Commission further extended the effective date of its order in said proceeding so as to become effective February 28, 1947, upon not less than five days' notice.

II

Intervener admits the allegations of section II of the complaint.

90

III

Intervener admits the allegations of section III of the complaint.

IV

Intervener admits the allegations of section IV of the complaint.

V

Intervener denies that section V of the complaint sets forth truly, accurately, adequately, or correctly the position of intervener in said proceeding before the Commission; on the contrary, intervener avers that the allegations of section V of the complaint constitute merely a self-serving summarization by plaintiffs of the complaint of intervener in said proceeding before the Commission; and intervener further avers that, if plaintiffs desire to plead said complaint before the Commission as a part of their complaint herein, they should do so by attaching a true and correct copy thereof to their complaint herein. Intervener further avers that a true and complete understanding of the position of intervener in said proceeding before the Commission can be obtained only from the entire record before the Commission and the Commission's decision in said proceeding.

VI

Intervener admits that the position of plaintiffs in the proceeding before this court is set forth in said section VI of their com-

plaint; but denies that said section VI adequately or correctly summarizes the facts of record in said proceeding before the Commission; and for a more full and complete summarization of said facts intervener refers to said decisions and order of the Commission attached to plaintiffs' complaint herein as exhibit A. Intervener avers that said decision of the Commission is based upon all of the facts of record in said proceeding and that said decision is valid and lawful if said decision is sustained by substantial evidence. Intervener further avers that the allegations set forth in said section VI of the complaint constitute no legal basis upon which the court may enjoin or annul the order of the Commission in said proceeding.

91

VII

Intervener denies that the order of the Commission in said proceeding is accurately quoted in section VII of the complaint herein and, for a true and complete copy of said order, refers to exhibit A attached to plaintiff's complaint herein.

VIII

(a) Intervener denies the allegation of section VIII (a) of the complaint herein that said report and order of the Commission contain findings and requirements which transcend the constitutional and statutory powers of the Commission and misinterpretations and misapplications of the law which would subject plaintiffs herein to irreparable damages and penalties.

(b) Intervener denies that said report and order of the Commission contain findings which are not supported by substantial evidence in the record; denies that there is no rational basis to support certain conclusions in said report and order; and denies that the evidence of record before the Commission in said proceeding is totally or otherwise insufficient to support the ultimate findings and conclusions of the Commission and the order based thereon.

(c) Intervener denies that, in reaching the conclusions stated in said report, the Commission has totally, partially, or in any particular disregarded the evidence offered by plaintiffs herein; denies that the Commission has arbitrarily or capriciously based its findings upon arguments and assertions made by complainant in said proceeding before the Commission; and denies that the findings of the Commission in said report are unsupported by substantial evidence.

92

(d) Intervener denies that, in reaching its conclusions and in making its findings in said proceeding, the Commission acted ar-

bitrarily and unreasonably respecting important facts, or any facts, established by defendants.

(1) Intervener denies that said report and order of the Commission are void and of no effect because of the impossibility of carrying it into effect; denies that said order of the Commission would require plaintiffs to commit an act of unlawful trespass upon the property of others and thereby subject plaintiffs to further litigation and irreparable damages; and denies that said order of the Commission requires an impossible performance by plaintiffs herein, for the failure of which performance plaintiffs herein, their officers, representatives, or agents would be subjected to heavy and irretrievable penalties under section 16 (8) of the Interstate Commerce Act, U. S. C. A. title 49, § 16, par. (8); or any other law. On the contrary, intervener avers that the Cleveland Union Stock Yards Company was a defendant in said proceeding before the Commission and that said Cleveland Union Stock Yards Company is bound by the terms of said order to the same extent as the plaintiffs herein.

(a) Intervener further denies that said 1,619 feet of track is not controlled by plaintiffs herein and avers that, on the contrary, the evidence of record in said proceeding before the Commission, as well as the report of the Commission in said proceeding,
93 shows that the said 1,619 feet of track is controlled by one of the plaintiffs herein, to wit, The New York Central Railroad Company.

(b) Intervener denies that the order of the Commission would require plaintiffs herein to trespass upon the land and 1,619 feet of track owned and controlled by one of the defendants before the Commission in said proceeding, to wit, the Cleveland Union Stock Yards Company; and denies that said land and said 1,619 feet of track are controlled by said Cleveland Union Stock Yards Company. Intervener denies that said land and 1,619 feet of track cannot be used for the purpose required in the order or for any reason set forth in the complaint herein. Intervener avers that, on the contrary, under the conditions established in the record before the Commission in said proceeding and set forth in the report of the Commission herein, it is the lawful duty of the plaintiffs herein, as well as of said Cleveland Union Stock Yards Company, to comply with said order of the Commission.

(c) Intervener denies all of the allegations of section VIII (d) (1) (c) of the complaint herein.

(d) Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section VIII (d) (1) (d) of the complaint herein. Intervener avers, however, that, if said allegations as to a notice in writing, dated November 15, 1946, are true, it would merely indicate that the

Cleveland Union Stock Yards Company, one of the defendants in said proceeding before the Commission and against whom the Commission's order runs, is seeking unlawfully to evade compliance with said order and to aid, abet, and induce violation of said order of the Commission.

94 (e) Intervener denies each and every allegation contained in section VIII (d) (1) (e) of the complaint.

(2) Intervener denies each and every allegation contained in section VIII (d) (2) of the complaint herein.

(a) (b) (c) Intervener denies each and every allegation contained in section VIII (d) (2) (a), (b), and (c) of the complaint except insofar as said allegations constitute mere copies of disconnected portions of the report of the Commission in said proceeding, and avers that said section is purely argumentative and forms no proper part of the complaint herein.

(d) Intervener denies each and every allegation contained in section VIII (d) (2) (d) of the complaint herein.

(3) Intervener denies each and every allegation contained in section VIII (d) (3) of the complaint herein. Intervener avers that said section of said complaint is purely argumentative and that the decisions cited therein in nowise relate to delivery of livestock or other traffic to intervener's plant at Cleveland, Ohio. Intervener further avers that, prior to said decision of the Commission and prior to the filing of the complaint in this court, said plaintiffs had published and filed with the Commission a tariff known as W. S. Curlett's tariff I. C. C. No. A–833, effective January 1, 1946; that said tariff is applicable to deliveries of livestock and all other freight to intervener's plant at Cleveland, Ohio, as well as to other deliveries of freight at Cleveland, Ohio; and that said tariff has been accepted by the Commission as giving effect to the principles announced by it in the decisions

95 cited or quoted by plaintiffs in section VIII (d) (3) of the complaint herein. A true and correct copy of said W. S. Curlett's tariff I. C. C. No. A–833 is attached to this answer and marked exhibit "A," and a duly certified copy thereof will be presented to the court upon the trial of this case.

(a) Intervener denies each and every allegation contained in section VIII (d) (3) (a) of the complaint herein.

(b) Intervener denies each and every allegation contained in section VIII (d) (3) (b) of the complaint herein. Intervener avers that, on the contrary, failure to comply with said order of the Commission would subject intervener to undue prejudice and disadvantage in and to the extent and for the reasons stated by the Commission in its report in said proceeding.

(4) Intervener denies each and every allegation contained in section VIII (d) (4), (a), (b), and (c) of the complaint herein.

Intervener avers that said allegations are purely argumentative and fail to indicate any unlawful conclusion or finding by said Commission.

(5) Intervener denies each and every allegation of section VIII (d) (5) of the complaint herein.

(6) Intervener denies each and every allegation of section VIII (d) (6) of the complaint herein.

(7) Intervener denies each and every allegation of section VIII (d) (7) of the complaint herein.

(8) Intervener denies each and every allegation of section VIII (d) (8) of the complaint herein.

(9) Intervener denies each and every allegation of section VIII (d) (9) of the complaint herein.

96 IX

For a further defense herein intervener alleges that the Cleveland Union Stock Yards Company was a defendant in said proceeding before the Commission, having been made so under the provisions of U. S. C. A. title 49, § 42; that said order of the Commission applies to said Cleveland Union Stock Yards Company to the same extent and subject to the same provisions of law, including penalties, as it applies to plaintiffs in this complaint; and that said Cleveland Union Stock Yards Company may not lawfully disobey said order or aid, abet, or induce disobedience to said order by the plaintiffs herein.

Wherefore, having fully answered the complaint, intervener prays that the relief therein prayed be denied and that the complaint be dismissed with costs to the intervener and that the intervener have the benefit of such other and further orders, decrees, or relief as may be just and proper.

John P. Staley,
JOHN P. STALEY,
Ross Dean Rynder,
ROSS DEAN RYNDER,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

DECEMBER 24, 1946.

97 *Exhibit "A" to answer*

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-833	154-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-33, P. U. C.-N. J. A-29, P. S. C.-N. Y. A-146, Pa. P. U. C. A-12, Vt. P. S. C. A-26, Va. C. C. A-66, P. S. C.-W. Va. A-[illegible]
I. N. Doe	532	53-A	Conn. P. U. C. 12, Maine P. U. C. 47, M. D. P. U. [illegible], N. H. P. S. C. 40, P. S. C.-N. Y. 61, R. I. P. U. A. [illegible], Vt. P. S. C. 41.
B. T. Jones	4002	632	Ill. C. C. 542, Ind. R. C. D-750, K. R. C. 93, Mich. P. S. C. 684, P. S. C.-N. Y. 272, Ohio 2150, Pa. P. U. C. [illegible], P. S. C.-W. Va. 291.
R. G. Raasch	600	.....	Ill. C. C. 300, Ind. R. C. 154, P. S. C. Mo. 69.

(For cancellations, see page 2 herein)

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

LOCAL FREIGHT TARIFF OF RULES GOVERNING RECEIPT AND DELIVERY OF CARS OF FREIGHT (EXCEPT COAL AT MINES, BREAKERS AND WASHERIES, IRON ORE AT MINES, BEEHIVE COKE OVENS, AND TRAFFIC AT THE DOCK WHERE SUCH TRAFFIC IS INTERCHANGED WITH WATER CARRIERS)

ON, TO, AND/OR FROM PRIVATE TRACKS AND INDUSTRIAL TRACKS SERVED BY CARRIERS SHOWN ON PAGES 2 TO 9 HEREIN

Issued September 28, 1945. Effective November 1, 1945.

B. T. Jones, Agent, 608 South Dearborn Street, Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Boulevard, Chicago 6, Ill.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Issued by W. S. Curlett, Agent, 143 Liberty Street, New York 6, N. Y.

98 CANCELLATIONS

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-830	154	Ill. C. C. A-1, Ind. R. C. A-1, P. S. C.-Md. A-32, P. U. C.-N. J. A-28, P. S. C.-N. Y. A-144, Pa. P. U. C. A-128, Vt. P. S. C. A-25, Va. C. C. A-65, P. S. C.-W. Va. A-[illegible]
I. N. Doe	531	52	Conn. P. U. C. 12, Maine P. U. C. 46, M. D. P. U. [illegible], N. H. P. S. C. 39, P. S. C.-N. Y. 60, R. I. P. U. A. [illegible], Vt. P. S. C. 40.
B. T. Jones	3992	.....	Ill. C. C. 541, Ind. R. C. D-748, K. R. C. 92, Mich. P. S. C. 683, P. S. C.-N. Y. 271, Ohio 2148, Pa. P. U. C. 311, P. S. C.-W. Va. 290.
R. G. Raasch	594	.....	Ill. C. C. 297, Ind. R. C. 153, P. S. C. Mo. 68.

LIST OF CARRIERS

Name of carrier	Powers of attorney and concurrences issued to—																						
	W. S. Curtlett, Agent						B. T. Jones, Agent						R. G. Rasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C. Md. F Md. 1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C. N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Akron & Barberton Belt Railroad Company, The	FX7, No. 1																						
Akron, Canton & Youngstown Railroad Company, The							109																
Aliquippa and Southern Railroad Company	FX9, No. 1					6																	
Alton and Southern Railroad	FX7, No. 12																						
Alton Railroad Company, The (Henry A. Gardner, Trustee)							30	22															
Ann Arbor Railroad Company, The							116			41													
Arcade and Attica Railroad Corporation	75				36																		
Aroostook Valley Railroad Company																27	10						
Baltimore and Annapolis Railroad Company, The	FX7, No. 6			8																			
Baltimore and Eastern Railroad Company	35			18																			
Baltimore and Ohio Railroad Company, The	189			30	34	36																	
Baltimore and Ohio Chicago Terminal Railroad Company, The													77	27	26								
Barre and Chelsea Railroad Company																23							
Belfast & Moosehead Lake Railroad Company																29	13						

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.	
Belt Railway Company of Chicago, The													88	33									
Bessemer and Lake Erie Railroad Company							70																
Boston and Maine Railroad																84	12	10	8	36		3	
Boyne City Railroad Company							6			5													
Buffalo Creek Railroad Company (Erie Railroad Company and Lehigh Valley Railroad Company, Lessees)	FX7, No. 1				1																		
99 Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)							E60																
Canadian Pacific Railway Company (Lines West, Fort William, Fort William, Ont., and East thereof)																E15							
Canton Railroad Company	FX7, No. 11			13																			
Castleman River Railroad Company, The	FX7, No. 2																						
Central Indiana Railway Company							67		33														
Central Railroad Company of New Jersey, The (Shelton Pitney and Walter P. Gardner, Trustees)	99					86																	

Central Vermont Railway, Inc.																		21		7			4
Chestnut Ridge Railway Company	77					35																	
Chicago and Calumet River Railroad Company	FX7, No. 24																						
Chicago & Illinois Western Railroad	79	66A																					
Chicago & Western Indiana Railroad Company															31	20							
Chicago, Aurora and Elgin Railroad Company (Arthur L. Schwartz, Trustee)							89	72															
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)															CJ 25	CJ 16							
Chicago North Shore and Milwaukee Railroad Company (John B. Gallagher and Edward J. Quinn, Trustees)							86																
Chicago River and Indiana Railroad Company, The							13	11															
Chicago Short Line Railway Company															73	33						45	
Chicago, South Shore and South Bend Railroad							84	26	26														
Chicago, West Pullman & Southern Railroad Company															33	30							
Conemaugh & Black Lick Railroad Company	FX8, No. 1					19																	
Cornwall Railroad Company	81					40																	
Cumberland and Pennsylvania Railroad Company	68			31																			
Curtis Bay Railroad Company	FX9, No. 1			1																			
Cuyahoga Valley Railway Company, The							20																
100 Delaware and Hudson Railroad Corporation, The	20				19	17																	
Delaware, Lackawanna and Western Railroad Company, The	77				46	40																	
Delray Connecting Railroad	FX7, No. 1																						
Detroit and Mackinac Railway Company							62			19													
Detroit and Toledo Shore Line Railroad Company, The							66			20													

[1] Will only apply at points on Canadian Pacific Ry. in the States of Maine and Vermont.

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																						
	W. S. Curtlett, Agent						B. T. Jones, Agent						R. G. Raasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Detroit and Western Railroad Co.							8			1													
Detroit Terminal Railroad Company	X7, No. 1																						
Detroit, Toledo and Ironton Railroad Company							38			14													
Donora Southern Railroad Company							3					3											
East Broad Top Railroad and Coal Company	29					24																	
East Jersey Railroad and Terminal Company	111																						
East Washington Railway Company	15			7																			
Elgin, Joliet and Eastern Railway Company													119	29	27								
Erie Railroad Company (Lines Buffalo, Salamanca, N. Y., and East)	122				78	60																	
Erie Railroad Company (Line Buffalo, Salamanca, N. Y., and West)							2				2												
Etna & Montrose Railroad Company							11					8											
Fairport, Painesville and Eastern Railroad Company, The							33																
Federal Valley Railroad Company, The							27																

Fore River Railroad Corporation															25		2					
Grafton and Upton Railroad Company															74		4					
Grand Trunk Railway System (Lines in the United States, East of the west bank of the Detroit and St. Clair Rivers), comprising the following carriers:																						
Canadian National Railway Company															B55	A9		A2				
The Champlain and St. Lawrence Railroad Company (Note)																						
The United States and Canada Rail Road Company (Note)																						
Note.—Canadian National Railway Company, Lessee.																						
Grand Trunk Western Railroad Company							1	1	1	1												
Greenwich & Johnsonville Railway Company	61				32																	
Gulf and Ship Island Railroad Company	A59																					
Hillsboro and North Eastern Railway Company							28															
101 Hoboken Manufacturers Railroad Company (Forrest S. Smith, Trustee)	83																					
Huntingdon and Broad Top Mountain Railroad and Coal Company, The	77					33																
Illinois Central Railroad Company	268	42	41																			
Illinois Northern Railway													101	27								
Illinois Terminal Railroad Company													66	45								
Indiana Harbor Belt Railroad Company													111	31	32							
Indiana Northern Railway Company	FX7, No. 1																					
Indianapolis Union Railway Company, The							11															
Ironton Railroad Company, The (Lehigh Valley Railroad Company and Reading Company, Lessee)	52					26																

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rausch, Agent			I. N. Doe, Agent								
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Jamestown, Westfield and Northwestern Railroad Company							22																	
Johnstown and Stony Creek Rail Road Company							5					5												
Lackawanna and Wyoming Valley Railroad Company	86					26																		
Lake Erie and Eastern Railroad Company, The	(FX2 No. 3)																							
Lake Erie and Fort Wayne Railroad Co.							6		4															
Lake Erie, Franklin & Clarion Railroad Company	64					23																		
Lakeside and Marblehead Railroad Company, The							51																	
Lake Terminal Railroad Co., The							7																	
La Salle and Bureau County Railroad Company, The							48	10				5												
Lehigh and Hudson River Railway Company, The	74					42																		
Lehigh and New England Railroad Company	89					41	34																	
Lehigh Valley Railroad Company	76					42	37																	
Ligonier Valley Railroad Company	30						13																	
Long Island Rail Road Company, The	88					38																		

Lorain & West Virginia Railway Company, The								50																			
Louisville & Jeffersonville Bridge and Railroad Company								11		1																	
Maine Central Railroad Company																			C27	14		9					
Manistee and Northeastern Railway Company								16			8																
Manistique and Lake Superior Railroad Company								45			19																
102 Manufacturers' Junction Railway Company																28	17										
Marcellus and Otisco Company, Inc., The	13				8																						
Maryland and Pennsylvania Railroad Company	77			27		34																					
Massena Terminal Railroad Company, The	{FX7, No. 1	}																									
McKeesport Connecting Railroad Co								7						9													
Middle Creek Railroad Company	{FX7, No. 1	}																									
Middletown and Unionville Railroad Company (Louis F. Zieres, Trustee)	101				43																						
Mississippi Central Railroad Company	89																										
Monongahela Connecting Railroad Company, The	{FX9, No. 1	}				6																					
Monongahela Railway Company, The	63					37																					
Morristown & Erie Railroad Company	70																										
Moshassuck Valley Railroad Company																			75						13		
Mount Hope Mineral Railroad Company	29																										
Muskegon Railway and Navigation Company	{FX7, No. 1	}																									
Narragansett Pier Railroad Company, The																			60						16		
Newburgh and South Shore Railway Company, The								19																			
New Haven & Dunbar Railroad Company	{FX7, No. 1	}			2																						
New Jersey and New York Railroad Company, The (Peter Duryee, Trustee)	N44				N38																						

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																				
	W. S. Curtiett, Agent						B. T. Jones, Agent						R. G. Roasch, Agent			I. N. Doe, Agent					
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. F1 No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. F1 No.	Pa.-P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. FM-1 No.	P. S. C.-N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C.-N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
New Jersey, Indiana & Illinois Railroad Company							63		22													
New York and Long Branch Railroad Company, The	84																					
New York Central Railroad Company, The							4	3	3	2	3	3						3				
Boston and Albany District.																						
Chicago, Kalamazoo & Saginaw District.																						
Cleveland, Cincinnati, Chicago & St. Louis District.																						
Eastern District.																						
Michigan Central District.																						
Western District.																						
West Shore District.																						
New York, Chicago and St. Louis Railroad Company, The							A25	A13	A13		A16	A13										
New York, New Haven and Hartford Railroad Company, The (Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees)																96		24		45	22	
183 New York, Ontario and Western Railway Company (Raymond L. Gibbardt and Ferdinand J. Siegbardt, Trustees)	81				48	40																
New York, Susquehanna and																						

New York, Susquehanna and Western Railroad Company (Henry K. Norton, Trustee)	81																					
Northampton and Bath Railroad Company	151					36																
Norwood & St. Lawrence Railroad Company	67				28																	
Ohio & Morenci Railroad Company, The							1															
Ohio Public Service Company, The	29						9				9											
Owasco River Railway, The																						
Patapsco & Back Rivers Railroad Company	{FX8, No. 1}			18																		
Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., Inc.) (The Union Transportation Company, Lessee)	38																					
Pennsylvania Railroad Company, The	70			15	20	18																
Pennsylvania-Reading Sea-Shore Lines	26																					
Peoria and Pekin Union Railway Company							35	14														
Pere Marquette Railway Company							101		24	30												
Philadelphia, Bethlehem and New England Railroad Company	{FX8, No. 1}					21																
Pittsburgh, Allegheny & McKees Rocks Railroad Company							9					10										
Pittsburg & Shawmut Railroad Company, The	57					30																
Pittsburgh and Lake Erie Railroad Company, The	99					20																
Pittsburgh and Ohio Valley Railway Company	{FX7, No. 2}					6																
Pittsburgh & West Virginia Railway Company, The	61					31																
Pittsburgh, Chartiers & Youghiogheny Railway Company	97					40																
Pittsburg, Shawmut & Northern Railroad Company, The John D. Dickson, Receiver)	106				63	55										28	14					
Portland Terminal Company																						

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rasach, Agent			I. N. Doe, Agent								
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. F1 No.	P. S. C. Md. F Md. 1 No.	P. S. C. N. Y. F1 No.	Pa.-P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. FM-1 No.	P. S. C. N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C. N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Pullman Railroad Company	FX1 No. 6																							
Rahway Valley Company (Rahway Valley Company, Lessee)	89																							
Raritan River Rail Road Company	26																							
Reading Company	43					26																		
104 River Terminal Railway Company, The	14																							
Roslyn Connecting Railroad Company	18																							
Rutland Railroad Company (William E. Navin and Wallace M. Fay, Trustees)																A1				A2		A2		
St. Johnsbury & Lake Champlain Railroad Company, The (John E. Willis, Trustee)																1						1		
St. Louis & Belleville Electric Railway Company													26	14										
St. Louis and Ohio River Railroad	69																							
South Buffalo Railway Company	FX2, No. 2				17																			
Springfield Suburban Railroad Company, The	FX7, No. 1																							
Springfield Terminal Railway Company																10						8		

Staten Island Rapid Transit Railway Company, The	61				33																				
Steelton & Highspire Railroad Company	FX8, No. 1					20																			
Suncook Valley Railroad																		18			7				
Toledo, Angola & Western Railway, The	FX7, No. 3																								
Toledo, Peoria & Western Railroad (Holly Stover, Federal Manager)							62	28																	
Toledo Terminal Railroad Company, The							40																		
Toronto, Hamilton and Buffalo Railway Company, The							FX8, No. 40																		
Trenton-Princeton Traction Company	23																								
Union Freight Railroad Company (Boston, Mass.)																		30		9					
Union Railroad Company							40					9													
Unity Railways Company	24																								
Upper Merion and Plymouth Railroad Company	FX7, No. 1					1																			
Wabash Railroad Company [1]							268	62	47	20	30														
Washington and Old Dominion Railroad	92																								
Waynesburg & Washington Railroad							22					13													
Western Maryland Railway Company	90			28		29																			
Wharton and Northern Railroad Company	45																								
Wheeling and Lake Erie Railway Company, The							49																		
Winfield Railroad Company, The							26				17														
Wyandotte Southern Railroad Company							6																		
Wyandotte Terminal Railroad Company							A7			A															
Yazoo and Mississippi Valley Railroad Company	161																								
York Utilities Company																		15		6					
Youngstown & Northern Railroad Company, The							7																		

[1] Will only apply at points on Wabash R. R. in the States of Illinois, Indiana, Michigan, New York, and Ohio.

106 Rule I.—Except as otherwise provided in Rule III and except as otherwise provided in other tariffs, cars of freight moving at carload rates including switching rates and cars of less carload or any quantity freight subject to rules governing the handling of ferry or trap cars as published in tariffs lawfully on file with the Interstate Commerce Commission and State Commissions, will be delivered on and removed from privately owned sidetracks or industrial tracks near and connecting with the carrier's tracks without any additional charge, provided there are no conditions which make it unsafe for the carrier's locomotives to operate over such tracks, or that prevent the carrier from receiving or delivering cars at its ordinary operating conveneince. (See Note 2.)

Rule II.—Except as otherwise provided in Rule III, cars covered by Rule I will be received and delivered at loading and unloading locations on tracks designated by the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes 1 and 2, provided the locomotives in general use for switching in the vicinity of the plant site can safely operate over the tracks within the plant site.

Rule III.—When receipt or delivery of a car or cars as provided in Rules I and II cannot be accomplished in continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions:

(a) If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held a charge of $1.00 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

Charges will be assessed in accordance with the next preceding paragraph when delays encountered during a locomotive trick or shift aggregate more than 30 minutes.

(b) If, after a reasonable period of delay, the obstruction or condition preventing completion of service has not been removed or eliminated the carrier may, at its option, withdraw its locomotive and place the car or cars on a hold or other available track or tracks within, or without, the industry plant site. Charges for the delay encountered shall be computed in accordance with paragraph (a). Subsequent movement by carrier locomotive of the car or cars from the hold or other track or tracks to actual point of delivery will be subject to a charge of $3.47 per car.

(c) For the purpose of applying the provisions of paragraphs (a) and (b) time shall commence to run from the minute the conductor determines that the shipper or consignee is unable to accept service.

Definition of Terms Used Herein

Note 1.—"Continuous movement" means a movement between the carrier's tracks and the loading or unloading locations, a hold track or tracks, or other place where cars are received or delivered without any delay or any suspension or break in time, or continuity of the movement, due to any circumstances or condition for which the industry is directly responsible.

Note 2.—"Ordinary operating convenience" means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arrives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.

107 STATE OF ILLINOIS,
County of Cook, ss:

CERTIFICATE OF SERVICE

I, John P. Staley, Attorney for the intervener, Swift & Company in the above entitled action, hereby depose and say that on the 24th day of December 1946, I served the attached answer upon each other party to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Mr. Dwight D. Buss, 1956 Union Commerce Bldg., Cleveland, Ohio; Mr. George H. P. Lacey, 1857 Union Commerce Bldg., Cleveland, Ohio; Mr. Willis T. Pierson, Law Department, Erie Railroad Company, Midland Building, Cleveland, Ohio; Mr. John A. Duncan, 1669 Union Commerce Bldg., Cleveland, Ohio; Mr. Robert R. Pierce, 1324 W. Third Street, Cleveland, Ohio; Honorable Don C. Miller, United States District Attorney for the Northern District of Ohio, Federal Building, Cleveland, Ohio; Honorable E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.; Honorable Thomas C. Clark, Attorney General of the United States, Washington, D. C.

Witness my signature this 24th day of December, 1946.

John P. Staley.
JOHN P. STALEY.

Subscribed and sworn to before me, the undersigned Notary Public in and for Cook County, State of Illinois this 24th day of December 1946.

JEAN J. SMITH,
Notary Public.

My commission expires May 15, 1948.

109 In United States District Court

[Title omitted.]

No. 24435 Civil

Order assembling a three-judge court

Filed Jan. 2, 1947

It appearing that the plaintiffs filed a bill of complaint on November 20, 1946, in the above-entitled proceedings, seeking to set aside and annul an order of the Interstate Commerce Commission, and this court having found that the issues joined must be pre-

sented to a statutory court consisting of three judges, one of whom shall be a circuit judge,

It is, therefore, ordered that the issues in this case be, and they are hereby, set for hearing on Tuesday, February 25, 1947, at 10 o'clock, A. M., in the Federal Court Building in the City of Cleveland, Ohio, and the Honorable Florence E. Allen, United States Circuit Judge, Sixth Circuit, and the Honorable Emerich B. Freed, United States District Judge for the Northern District of Ohio, or such other judge or judges as circumstances may require to be substituted for either or both of these judges, are called to the assistance of the judge of this court to hear and determine the said cause.

PAUL JONES,
United States District Judge.

JANUARY 2, 1947.

110 In District Court of the United States, Northern District of Ohio, Eastern Division

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Motion for preliminary injunction

Filed, Dec. 13, 1946

The plaintiff herein moves this Honorable Court for preliminary injunction, restraining and enjoining the defendants, their employees, attorneys, agents, and all other persons in participation with them, pending the final hearing and determination of this action, from putting into effect and enforcing the order of the Interstate Commerce Commission in Docket No. 28714 entitled Swift & Company v. Baltimore and Ohio Railroad Company, et al., on the grounds that:

(1) Unless restrained by this Court the defendants will enforce the said order and perform the acts referred to;

(2) Such action will result in irreparable injury, loss and damage to the plaintiff and its property, as more particularly appears in the verified complaint and the affidavit of Matthew S. Farmer, attached hereto;

(3) The issuance of a preliminary injunction herein will cause

no undue inconvenience or loss to the defendants but it will, on the other hand, prevent irreparable injury to the plaintiff and its property.

THE CLEVELAND UNION STOCK
YARDS COMPANY,
By M. S. FARMER
Its Attorney,
802 Engineers Building, Cleveland 14, Ohio.

111 *Affidavit in support of motion for preliminary injunction*

STATE OF OHIO,
Cuyahoga County, ss:

Matthew S. Farmer, being first duly sworn, upon oath, deposes and says that:

He is the Attorney for The Cleveland Union Stock Yards Company, the plaintiff herein, and as such has personal knowledge of the fact that the plaintiff was respondent in a cause of action before the Interstate Commerce Commission entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., under Docket No. 28714, and that he has personal knowledge of all the facts hereinafter stated.

Affiant further says that The Cleveland Union Stock Yards Company operates a stock yards and public market on the westerly side of West 65th Street in Cleveland, Ohio, and in connection therewith it has a sidetrack of 1,619 feet located on its property near the westerly side of West 65th Street; that Swift and Company and other packers operate livestock processing plants in the stockyard district; that the sidetrack of Swift and Company does not connect directly with the New York Central main line of railroad; that any connection must be by the use of said sidetrack of The Cleveland Union Stock Yards Company; that the use of said track for delivery of livestock to Swift and Company will divert the business from the Stock Yards without compensation; that the plaintiff is entitled to compensation commensurate with the revenue it would charge if deliveries were made through the Stock Yards; that it has been unable to reach an agreement for compensation with either The New York Central Railroad Company or Swift and Company; that the order of the Com-
112 mission appropriated the property of the plaintiff without just compensation for use of Swift and Company; that the plaintiff is deprived of due process of law under Constitutional guarantees; that the plaintiff would be subject to severe penalties under the Interstate Commerce Act if it arbitrarily refuses the use of its sidetrack for deliveries of its livestock to the plant of

Swift and Company; and that by reason of all these things The Cleveland Union Stock Yards Company would suffer irreparable injury and damage to its business and property and it has no plain, complete and adequate remedy at law.

Further affiant sayeth naught.

M. S. FARMER.

Sworn to before me and subscribed in my presence this 13th day of December A. D. 1946.

[SEAL] ELMER J. WARRICK,
Notary Public,
Cuyahoga County, Ohio.

My commission expires Sept. 4, 1947.

114 In United States District Court

Civil No. 24479

[Title Omitted.]

Complaint

Filed Dec. 13, 1946

To the Honorable the Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

The Cleveland Union Stock Yards Company is a corporation and as plaintiff in this action complains of the defendants, The United States of America and The Interstate Commerce Commission, and alleges that it has a cause of action against them cognizable by this Court because of the facts set forth in the following paragraphs:

I

The plaintiff is now and was at all times mentioned herein a corporation duly organized and existing under the laws of the State of Ohio for the purpose of carrying on a stock yard business and the plaintiff is a citizen of the State of Ohio and a resident of the City of Cleveland in the Northern District of Ohio, Eastern Division.

II

The plaintiff was a party to, and is interested in, certain proceedings brought and instituted before one of the defendants, The Interstate Commerce Commission, by Swift & Company, a corporation, details of which are hereinafter more particularly set forth. Said proceedings were styled No. 28714, Swift &
115 Company vs. The Baltimore and Ohio Railroad Company, et al. The grounds upon which the jurisdiction of this

Court depends are that this is a suit to enjoin the enforcement of, and to set aside, suspend and annul, an order made and entered in said proceedings by The Interstate Commerce Commission as reported in 266 I. C. C., page 55. By reason thereof this suit is of a civil nature in equity which arises under the Constitution and laws of the United States. It is brought under and by authority of the Act of Congress approved October 22, 1913, and known as The District Court Jurisdiction Act, U. S. C. Title 28, Section 41 (27) to 48. The said order was to become effective August 30, 1946, but by requested action of the Commission on several occasions the effective date has finally been postponed until February 28, 1947. A copy of the report and order of the Commission is attached hereto as "Exhibit A."

III

The United States of America is made a party defendant under authority of The Jurisdiction Act, U. S. C. Title 28, Section 46.

IV

The Interstate Commerce Commission was created as an administrative body by the Act to Regulate Commerce, approved February 4, 1887, and exists under and by virtue of said Act and various other acts amending and supplementing the same, all of which are known as The Interstate Commerce Act, Title 49 U. S. C. The powers and duties of said Commission are defined and vested by said Act.

V

The plaintiff, The Cleveland Union Stock Yards Company, was incorporated under the laws of the State of Ohio in 1893 for the purpose of operating a general stockyards business. Ever since its organization it has been, and is now, engaged in the business of operating public stockyards and a public market on West 65th Street, Cleveland, Ohio. In connection with its stockyard business it has loading and unloading chutes, pens,
116 alleys, driveways, other stockyard facilities, and railroad switches and tracks. One particular track, which is involved here because of the report and order of The Interstate Commerce Commission, is owned by the plaintiff and is located upon the property of the plaintiff slightly west of West 65th Street, Cleveland, Ohio, and in close proximity to said Street. It is 1,619 feet long and lies between the main line of The New York Central Railroad Company and the plant of Swift & Company. The compelled use of that track for delivery of livestock

to Swift & Company's plant in the Stock Yards District in said City of Cleveland, contrary to contractual relationships and legal rights of the plaintiff as hereinafter more particularly set forth, was involved in the proceedings before The Interstate Commerce Commission, and whether such use can be compelled by the Commission is therefore involved in this suit.

VI

After Congress passed the Packers and Stock Yards Act in 1921, U. S. C. Title 7, Sections 181 to 231, the yards of the plaintiff on West 65th Street, Cleveland, Ohio, were posted as a "Stockyard" under the provisions of said Act, and from then until now the plaintiff has been under the jurisdiction of the United States Secretary of Agriculture as to stockyard service. With respect to nonstockyard service, the plaintiff is free to make its own contracts and agreements as a private industry.

VII

Swift & Company is a corporation organized under the laws of the State of Illinois, having its principal place of business and general offices in the City of Chicago in said State. It is engaged in the packing house business and in connection therewith it operates a branch packing plant for the processing of livestock in the Cleveland Stock Yards District between West 63d and West 65th Streets. It can receive freight in railroad cars at
117 its Cleveland plant only by use of the plaintiff's private sidetrack of 1,619 feet for the purpose of switching cars from the main line of The New York Central Railroad to said plant. For many years, by virtue of conventional sidetrack agreements, cancelable at the will of either party upon certain notice, definite as to manner and time (six months under the existing agreement), the plaintiff has permitted The New York Central Railroad Company to use said sidetrack for transportation of freight in railroad cars, exclusive of livestock, to and from the plant of Swift & Company and other plants accessible to said sidetrack. The plaintiff has, however, in its sidetrack agreement with The New York Central Railroad Company, found it necessary, for the protection of its own business, to prohibit the delivery of livestock from its said sidetrack to Swift & Company and other plants accessible to said sidetrack unless the plaintiff receive compensation which would be commensurate with the loss of business suffered in the diversion of livestock from the plaintiff's stockyards for direct delivery to the plants of Swift & Company and other packers located on said sidetrack. The New York Cen-

tral Railroad Company and the plaintiff could never agree upon what compensation the plaintiff should receive for the use of said sidetrack for the delivery of livestock and therefore, under the terms of the sidetrack agreement between said Railroad and the plaintiff, no livestock can be delivered to the plants of Swift & Company and the other packers on said sidetrack, but with the consent of the plaintiff it is used for the movement of other freight in railroad cars to and from said plants.

VIII

On or about September 3, 1941, Swift & Company filed with The Interstate Commerce Commission a complaint against The Baltimore and Ohio Railroad Company and all other railroad companies serving Cleveland, Ohio. The said Complainant also named The Cleveland Union Stock Yards Company as a de-
118 fendant upon the theory that it was a proper party and subject to the orders of The Interstate Commerce Commission under and by virtue of The Interstate Commerce Act, U. S. C. Title 49, Section 42. The complaint alleged a number of violations of The Interstate Commerce Act by the railroad companies named as defendants therein and sought the establishment of tariff provisions and other relief which would result in transportation to its plants of carload shipments of livestock at rates not in excess of the line-haul rates of the railroads named defendants in said proceedings.

The Cleveland Union Stock Yards Company, plaintiff herein, was alleged to be partly responsible for the alleged violation of The Interstate Commerce Act in that it refused to permit the delivery of livestock by said railroad companies over the 1,619 feet of track owned by the plaintiff, thereby depriving Swift & Company, the Complainant in said proceedings before The Interstate Commerce Commission, of delivery of carload shipments of livestock at its plant in Cleveland, Ohio.

IX

The defendant, The Interstate Commerce Commission, in making the findings and report, and in issuing the order in the case of Swift & Company vs. The Baltimore and Ohio Railroad Company, et al., No. 28714, 266 I. C. C. 55, exceeded the power and authority delegated to it by The Interstate Commerce Act and by the Constitution of the United States and erred as a matter of law in the following particulars:

(a) In asserting jurisdiction over this plaintiff and over the subject matter of the Complaint. The Complaint of Swift & Com-

pany should have been dismissed by The Commission, particularly as to this plaintiff. The Cleveland Union Stock Yards Company is not, and was not then, a common carrier. Section 42 of The Interstate Commerce Act does not vest in The Interstate Commerce Commission the power to take the property of The Cleve-
119 land Union Stock Yards Company, even for public use, contrary to Amendments V and XIV to the Constitution of the United States. Congress did not intend Section 42 to empower The Interstate Commerce Commission to assume judicial functions such as are involved in condemnation proceedings. If Congress had intended to so empower the Commission, then Section 42 would have been null and void in that respect because of Constitutional prohibitions. These matters are left to the Courts and only to the Courts.

To compel this plaintiff permanently to permit the use of its sidetrack and the land occupied thereby for delivery of livestock to Swift & Company would amount to taking a strip of land fronting on West 65th Street, Cleveland, Ohio, without just compensation and without due process of law, guaranteed by the Constitution of the United States. The compelled use of this plaintiff's track and property would, moreover, deprive the plaintiff of revenue. The plaintiff is a Stock Yards Company engaged in the business of handling, storing, and delivering livestock, including livestock consigned direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering non-stockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the Railroad Company for delivery to packers through its stockyards. The charges for the use of these facilities average $3.73 per car. If livestock should be diverted from the pens of the plaintiff for delivery by the use of its sidetrack, plaintiff would then be deprived of compensation for the facilities, which would as a consequence remain idle. The plaintiff could not long remain in business under such circumstances.

120 (b) In holding that the sidetrack of the plaintiff had been "devoted to public use" and that such public use constituted any controlling factor. There was no evidence or law to substantiate a finding that the sidetrack had been dedicated to public use. The Commission therefore fully recognized that the use of said sidetrack was under a cancelable contract and that therefore it could not find that it had been dedicated to public use in such manner as to create an easement or prescriptive right.

Under the circumstances the plaintiff has the legal right not only to cancel the said contract but to entirely withdraw the use of said sidetrack for deliveries of any kind to the plants of Swift & Company and other packers.

(c) In holding that the plaintiff's 1,619 feet of track were a part of the general railroad system of The New York Central Railroad Company under the definition of a railroad under Section 1 (3) (a) of The Interstate Commerce Act.

The said sidetrack was not a part of said railroad system because: (1) it is the private industrial sidetrack of the plaintiff entirely located within its stockyards and upon its land; (2) The New York Central Railroad Company uses the track by virtue of the sidetrack agreement which restricts such use in time and manner, a right inherent in The Cleveland Union Stock Yards Company as the owner thereof; (3) Section 1 (22) of The Interstate Commerce Act specifically describes the character of track 1,619 and removes it from the jurisdiction of The Commission.

(d) In holding a violation of Section 3 (1) because of deliveries to The Lake Erie Provision Company, The Long Dressed Beef Company and The Ohio Provision Company. The circumstances and conditions surrounding the transportation of livestock to the plant of Swift & Company are not substantially similar to those surrounding the transportation of livestock to the three above-named companies for the reason that said three
121 companies are located on the main line of The New York Central Railroad Company and they are not within the stockyards district and do not require the use of the private industrial sidetrack of the plaintiff, whereas deliveries to the plant of Swift & Company must be by the use of this sidetrack. As a matter of fact, all packers who, like Swift & Company, are located on the 1,619 feet of sidetrack, are denied the use of said sidetrack for deliveries of livestock. Those packers are in fact and in law similarly situated. There is no violation and all such packers are treated exactly alike with respect to the use of the plaintiff's sidetrack.

(e) In holding that the compensation sought by the plaintiff for the use of its sidetrack for deliveries of livestock to Swift & Company amounted to a penalty. The Cleveland Union Stock Yards Company operated a stockyard under jurisdiction of the Secretary of Agriculture and by virtue of the Packers and Stock Yards Act its revenue depended upon handling livestock through its yards. The use of its sidetrack for deliveries of livestock to the plants of the packers would interfere with the plaintiff's own business. It had the right to protect itself and its business and the property of its stockholders by imposing charges upon The

New York Central Railroad Company for the use of such track. Those charges should compensate the plaintiff for the loss of business diverted by the use of its own instrumentality, that is, its sidetrack.

(f) In holding that Section 1 (9) of The Interstate Commerce Act is applicable. That section deals with switch connections of private sidetracks with the main lines of railroads. Swift & Company's private sidetrack, by virtue of a switch, could not be connected with the main line of The New York Central Railroad or the railroad of any other carrier serving Cleveland except by the use of the 1,619 feet of sidetrack owned by the plaintiff. The plaintiff was not a common carrier. The track has never been condemned or appropriated to a public use. The Commission carefully avoided finding that there had been a dedication
122 to public use. The Stock Yards Company was within its legal right in restricting the use of the track in such manner as to prevent Swift & Company from interfering with its business. There is no jurisdiction in the Commission to compel the plaintiff to permit the use of its track for delivery of livestock. The unconstitutionality of such compulsion is obvious. For these reasons alone, the complaint of Swift & Company should have been dismissed.

(g) In holding that the refusal to deliver livestock to the plant of Swift & Company violated Section 1 (6) of The Interstate Commerce Act. The compelled delivery of livestock over the sidetrack of the plaintiff would amount to taking the plaintiff's property without due process of law. Use of the track over the objection of the plaintiff could be obtained only by proper condemnation proceedings. The Commission has no power in respect to such proceedings. They are for Courts where the property owners may have the right of a trial by jury. In this particular instance, condemnation proceedings would rest with the Courts of Ohio.

(h) In entering an order against this plaintiff, which was indefinite, uncertain, erroneous, and unconstitutional. The plaintiff does not operate a railroad. It is not a common carrier. It has no freight car, passenger car, engine, crew, or anything else, except tracks constructed and maintained for its own use. It has, however, been willing to permit the use of its sidetrack for transportation of freight to the plants of the packers except that it would not permit delivery of livestock. Even that use is available upon proper consideration. In the absence of an agreement as to proper consideration, the restriction was necessary to protect the plaintiff's business. It was lawful. Despite these facts, the order of the Commission is directed to all defendants. This plain-

tiff, in view of the fact that it is not a common carrier and does not operate a railroad, could not comply with the order of the Commission. It could not put into force and maintain in
123 force thereafter a schedule, or schedules, providing for delivery of livestock to the sidetrack of Swift & Company.

Because of the unlawful, arbitrary, illogical, indefinite, and uncertain report and order of The Interstate Commerce Commission, as detailed in this Complaint, The Cleveland Union Stock Yards Company will suffer irreparable injury to its business by loss of revenue upon deliveries of livestock to the plant of Swift & Company instead of through its stockyards; by the illegal appropriation of its valuable property without condemnation proceedings; by perpetual use of its land on West 65th Street for easement purposes thereby depriving it of the opportunity of selling the same, or a part thereof, for business purposes; by depriving it of its Constitutional rights of adequate compensation upon condemnation proceedings in Courts, particularly the Courts of Ohio which would have jurisdiction over proceedings to appropriate its property to public use.

Unless the plaintiff can obtain the relief prayed for, including the granting of a restraining order or temporary injunction, it will suffer irreparable injury and damages to its property and business as hereinbefore set forth.

Wherefore, your plaintiff prays (a) that a three-Judge Court be organized, convened, or assembled, one of whom should be a Circuit Judge, to hear and determine the issues herein; (b) that a temporary order or injunction be entered herein, suspending, holding in abeyance, or enjoining the operation, execution, enforcement or effect of the report and order of The Interstate Commerce Commission until further order of this Court; (c) that at final hearing it be held, ordered, adjudged and decreed, that The Interstate Commerce Commission had no jurisdiction over The Cleveland Union Stock Yards Company or its property; that the Commission's report and order exceeded any authority of any kind vested in it; that such report and order was illegal, void,
124 and unconstitutional; that it be set aside, overruled, vacated, cancelled, suspended, and held for naught; that the enforcement thereof be perpetually restrained and enjoined; that the plaintiff be declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; that it had the right to collect such compensation as it thought proper; that it has the lawful right to cancel the sidetrack agreement with The New York Central Railroad Company; that it had the legal right to withdraw entirely the use of its sidetrack from Swift & Company and other plants and packers located upon it; and for

such other and further relief as equity and good conscience may require.

THE CLEVELAND UNION
STOCK YARDS COMPANY,
By M. S. FARMER, *Its Attorney,*
802 Engineers Building,
Cleveland 14, Ohio, Main 3567.

[*Duly sworn to by Philip H. Coad; jurat omitted in printing.*]

127 In United States District Court

No. 24479

[Title omitted.]

Order of Consolidation

Feb. 25, 1947

Entered by Allen, Jones, and Freed, Js.:

This day came the parties by their attorneys and upon application of the United States Attorney the court ordered this case consolidated with Civil Case No. 24435 for trial only.

Thereupon the court heard the argument of the attorneys and took the cause under advisement.

128 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of the United States

Filed Jan. 20, 1947

Now comes the United States of America, defendant in the above-entitled civil action, and for answer to the Bill of Complaint filed herein by plaintiffs on December 13, 1946, joins in and adopts the Answer heretofore filed by the Interstate Commerce Commission.

EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.
WENDELL BERGE,
Assistant Attorney General.
DON C. MILLER,
United States Attorney.
FRANCIS B. KAVANAGH,
Asst. U. S. Attorney.

129 CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the attached answer was served on January 17, 1947, upon each of the other parties to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: M. S. Farmer, Esquire, 802 Engineers Building, Cleveland 14, Ohio; Robert R. Pierce, Esquire, Chief Assistant General Attorney, New York Central Railroad Company, 1324 West Third Street, Cleveland 13, Ohio; John H. Duncan, Esquire, Attorney, Wheeling & Lake Erie Ry. Co., 1669 Union Commerce Building, Cleveland 14, Ohio; Willis T. Pierson, Esquire, General Counsel, Erie Railroad Co., Midland Building, Cleveland, Ohio; George H. P. Lacey, Esquire, % Squire, Sanders & Dempsey, 1857 Union Commerce Building, Cleveland 14, Ohio; Dwight B. Bpss, Esquire, % Baker, Hosteller & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio; Ross D. Rynder, Esquire, Attorney, Swift & Company, 4115 Packers Avenue, Chicago 9, Illinois; Edward M. Reidy, Esquire, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

JANUARY 17, 1947.

130 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 17, 1947

The Interstate Commerce Commission hereinafter called the Commission, a defendant in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I, II, III, and IV of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph V of the complaint, the Commission admits that such allegations are substantially correct, except that the Commission denies that the compelled
131 use of the 1,619 feet of track referred to therein is contrary to the legal rights of the plaintiff.

The Commission further alleges that while the said 1,619 feet of track referred to in paragraph V is owned by the plaintiff, such track is maintained and operated by the New York Central Railroad Company in the performance of its necessary common carrier duties and obligations.

III.

Answering the allegations of paragraph VI of the complaint, the Commission admits that plaintiff is subject in some particulars to the provisions of the Packers and Stock Yards Act of 1921. As to the other allegations of this paragraph, the Commission is without knowledge or information sufficient to form a belief as to the truth of such other allegations.

IV

Answering the allegations of paragraph VII of the complaint, the Commission admits the truth of the allegations contained in the first two sentences of said paragraph. The Commission denies that Swift & Company can receive freight in railroad cars at Swift's plant in Cleveland only by the use of plaintiff's track for the purpose of switching cars from the main line of the New York Central Railroad to said plant, and avers that no individual or private use is made by Swift & Company of said track but that by agreements, arrangements, and contracts between plaintiff and the New York Central Railroad Company, said 1,619 feet of track has become a part of the terminal facilities of the New York Central Railroad Company, which Swift & Company uses in common with other shippers or receivers of freight. The Commission therefore denies that said 1,619 feet of track is a private side track, as referred to in said paragraph, but avers that,
132 on the contrary, said portion of track is, under the Interstate Commerce Act, a portion of the New York Central's line of railroad.

The Commission is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph VII, but for a more full and correct statement in connection therewith it refers to the report and order of the Commission, attached to the complaint as Exhibit A.

V

Answering the allegations of paragraph VIII of the complaint, the Commission admits the same.

VI

Answering the allegations of paragraph IX of the complaint, the Commission denies that its report and order is invalid or in excess of its statutory authority for the reasons set forth in said paragraph IX, or for any other reason or reasons.

Answering further the allegations of the complaint, the Commission avers and alleges that the portion of track therein referred to as owned by the Cleveland Union Stock Yards Company is a part of the tracks of the New York Central Railroad Company, operated by the latter subject to the provisions of the Interstate Commerce Act; that, under contracts with the said Stock Yards, the New York Central has for years used, and still is using, the track as part of its railroad and terminal facilities at Cleveland; that the agreed, as well as actual, use, has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New
133 York Central's terminal track by which it renders common carrier switching service to and from the plant of Swift & Company and the several other plants and industries served thereby; that, while by amendment to the contracts made in 1935, restrictions, or conditions, were especially imposed as to the carriage of livestock, the use of the Stock Yard's track for all other traffic was continued just as formerly; that the Stock Yards, in contracting with the New York Central, presumably knew that it was dealing with a common carrier subject to regulatory laws; and that, as stated in the Commission's report (p. 65), "To say that the Stock Yards, while granting the use of its track 1619 generally for common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates."

Further answering the said allegations, the Commission says that, in performing its duties of regulating rates, practices, and service, it is constantly dealing with railroad lines or trackage, both road-haul and terminal, that include trackage held under lease, or trackage agreements, and where the leases, or agreements, may contain a provision for termination upon specified notice, or the termination date may be within the comparatively near future; that it may not, because of such considerations, abdicate

its duties but must enforce the Act's provisions under the existing conditions as to leasehold or trackage rights; that, similarly here, while the agreement between the Stock Yards and New York Central contained a clause authorizing termination by
134 either party upon 60 days' notice, this did not afford excuse for permitting continuance of the violations of the Act shown; nor did it obligate the Commission to attempt to anticipate what the parties might in the future do under the termination clause, or as to just what were their rights in that respect.

Answering further the allegations of paragraph (d) of section IX of the complaint, the Commission denies the same. In this connection the Commission avers that the question of violation of section 3 of the Act is primarily administrative and committed to the Commission's determination; that the Stock Yards, in contracting with the New York Central for the use of the track referred to, was dealing with a common carrier subject to regulatory laws; that whatever the Stock Yard's right to altogether withdraw its track from public use (which question was neither involved nor decided), it could not, while continuing to grant the use thereof generally for public service, single out particular traffic and, under the guise of a contract restriction or condition, force the railroad to refuse to switch and make delivery of such traffic as billed and as was its duty under the Act, or, in the alternative, to pay a special charge set up as in effect penalty for observing its tariffs and other duties under the laws to which it was subject; that that was not a lawful exercise by the Stock Yards of its rights in the track; that the railroad's acquiescence therein did not change this; that, therefore, the Stock Yard's asserted right to impose such special restrictions was not a circumstance which, as matter of law, rendered substantially different the circumstances and conditions in switching and making delivery of livestock to the plant of Swift & Company than were the circumstances and conditions in rendering like service to its competitors; and that, consequently, since no lawful con-
135 dition within the right of the Stock Yards to impose precluded the railroad from rendering such service for Swift & Company, it is obvious that the question of whether its failure to do so was unduly prejudicial was left as a purely administrative question committed to the judgment and determination of the Commission.

Further answering the allegations of the complaint, the Commission admits and alleges that it made and entered the report and order of May 3, 1946 (266 I. C. C. 55) referred to in paragraph II of the complaint and made a part thereof as Exhibit A, in a proceeding then pending before it entitled Docket No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Company et al., following

complaint filed with it on September 5, 1941, by Swift & Company as alleged in paragraph VIII of the complaint; that thereafter answer was filed to said complaint by plaintiff herein; that thereafter the proceedings came on for formal hearing at Cleveland, Ohio, on April 22, 1942, before Examiner Carter, at which hearing much oral testimony and other evidence in the form of exhibits was introduced by the respective parties; that thereafter briefs were filed by the parties with the Commission in support of their respective contentions; that thereafter, on or about April 1, 1943, a proposed report was served by Examiner Carter, recommending dismissal of Swift & Company's complaint, to which exceptions were filed by Swift & Company and a reply to said exceptions filed by the railroad defendants in the proceedings; that thereafter oral argument was had before the Commission on June 4, 1943; that by order of June 14, 1943, the proceeding was reopened for further hearing by the Commission whereupon further hearings were held before Examiner Haden at Cleveland on June 22, 1944, at which much further oral testimony and other evidence in the form of exhibits was introduced; that there-
136 after briefs on the rehearing were filed with the Commission by complainant, Swift & Company, and the railroad defendants; that thereafter, on or about May 26, 1945, a proposed report was served by Examiners Haden and Banks, again recommending dismissal of the complaint of Swift & Company to which exceptions were filed by Swift & Company, and replies to said exceptions were filed by defendants railroads and defendant Cleveland Union Stock Yards Company; that thereafter the case came on for reargument before the Commission on October 3, 1945, following which the Commission made and entered and served upon all parties to said proceedings its said report of May 3, 1946, and its said order of the same date. The Commission further alleges that following the issuance of said report and order of May 3, 1946, petition for reconsideration was filed with the Commission by plaintiff herein, Cleveland Union Stock Yards Company, to which a reply to said petition was filed by Swift & Company, and subsequently petition for reconsideration of said decision of May 3, 1946, was filed with the Commission by the railroad defendants in said Docket No. 28714, to which full reply was made by complainant, Swift & Company, following which the entire Commission, by order of October 7, 1946, denied said petitions for reconsideration filed by railroad defendants and defendant Cleveland Union Stock Yards Company. The Commission further alleges that by subsequent orders said order of May 3, 1946, has been from time to time extended so that its present effective date is February 28, 1947, on five days' notice.

The Commission admits and alleges that in said proceedings

the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large
137 volume of testimony and other evidence bearing upon the matters covered in said report and order were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiff herein, its said report and order of May 3, 1946, 266 I. C. C. 55, annexed to and made part of the complaint as Exhibit A; that said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its order of May 3, 1946, was based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

138 The Commission further alleges that said report and order of May 3, 1946, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause, plaintiff either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, the Commission denies

the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order referred to and made a part of the complaint as Exhibit A, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY, *Assistant Chief Counsel.*
GORDON C. LOCKE, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

139 [*Duly sworn to by J. Haden Alldredge; jurat omitted in printing.*]

140 CERTIFICATE OF SERVICE.

I, Edward M. Reidy, Attorney for defendant Interstate Commerce Commission in the above-entitled action, hereby certify that on the 16th day of January 1947, I served the attached answer upon each party to this action by depositing a copy in the United States mails addressed to each of the following attorneys and representatives at his respective address as follows: M. S. Farmer, Esq., 802 Engineers Bldg., Cleveland 14, Ohio; Edward J. Hickey, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; R. R. Pierce, Esq., Chief Assistant General Attorney, New York Central System, 1324 West Third Street, Cleveland 13, Ohio; Honorable Don Miller, United States District Attorney, Northern District of Ohio, Federal Bldg., Cleveland, Ohio; John H. Duncan, Esq., Attorney, The Wheeling & Lake Erie Ry. Co., 1669 Union Commerce Bldg., Cleveland 14, Ohio; Willis T. Pierson, Esq., General Counsel, Erie Railroad Co., Midland Bldg., Cleveland, Ohio; George H. P. Lacey, Esq., % Squire, Sanders & Dempsey, 1857 Union Commerce Bldg., Cleveland, Ohio; Dwight B. Buss, Esq., % Baker, Hosteller & Patterson, 1956 Union Commerce Bldg., Cleveland, Ohio; Ross D. Rynder, Esq., Attorney, Swift & Company, Union Stock Yards, Chicago, Ill.

EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

140A In United States District Court

Civil No. 24479

[Title omitted.]

Motion of Swift & Company for leave to intervene as a party defendant

Filed Dec. 20, 1946

(S) "Leave granted. Jones. 12/20/46 Judge."

Comes now Swift & Company, a corporation of the state of Illinois, and moves the court for leave to intervene in this action in order to assert defenses to be set forth in an answer to be filed herein and, in support of said motion, said Swift & Company shows the court as follows:

1. Swift & Company was and is the complainant before the Interstate Commerce Commission in a proceeding known on the records of said Commission as docket No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55. On May 3, 1946, said Commission made its report and order in said proceeding in which it granted certain relief sought therein by Swift & Company. Plaintiff has filed this action seeking to set aside said report and order of said Commission.

2. U. S. C. A. title 28, § 45a, authorizes Swift & Company, as a party in interest to said proceeding before said Commission, to intervene herein as of right.

Wherefore, said Swift & Company respectfully prays for the entry of an order granting it leave to intervene herein and to be made a party defendant hereto and to file instanter its separate answer to the complaint heretofore filed herein.

(S) Ross Dean Rynder,
(S) John P. Staley,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

141 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of Swift & Company, intervener

Filed Dec. 26, 1946

Now comes Swift & Company, hereinafter referred to as the intervener, and, for its separate answer to plaintiff's complaint herein, alleges and says:

I

Intervener admits the allegations contained in section I of the complaint.

II

Intervener admits the allegations contained in section II of the complaint.

III

Intervener admits the allegations contained in section III of the complaint.

IV

Intervener admits the allegations contained in section IV of the complaint.

V

Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section V of the complaint; but intervener denies that the compelled use of said track for delivery of livestock to Swift & Company's
142 plant in the Stock Yards District in said city of Cleveland is contrary to contractual relationships and legal rights of the plaintiff as set forth in its complaint herein. Intervener avers that, on the contrary, the use of said track by the New York Central Railroad Company was voluntary on the part of plaintiff and said New York Central Railroad Company.

VI

Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section VI of the complaint.

VII

Intervener admits that it is a corporation organized under the laws of the state of Illinois, having its principal place of business and general offices in the city of Chicago in said state. Intervener admits that it is engaged in the packing house business and that, in connection therewith, it operates a packing plant for the processing of livestock in the Cleveland Stock Yard District between West 63rd and West 65th Streets. Intervener denies that it can receive freight in railroad cars at its Cleveland plant only by use of plaintiff's private sidetrack for the purpose of switching cars from the main line of the New York Central Railroad to said plant.

Intervener avers that, on the contrary, no use is made by it of said track but that by agreements, arrangements, and contracts between plaintiff and the New York Central Railroad Company said 1619 feet of track has become a part of the terminal facilities of the New York Central Railroad Company. Intervener is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in section VII of the complaint, but for a true and correct statement in connection
143 therewith it refers to the report and order of the Interstate Commerce Commission in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55, a copy of which is attached to the complaint herein as exhibit "A."

VIII

Intervener admits the allegations of section VIII of the complaint.

IX

Intervener denies that the Interstate Commerce Commission exceeded the power and authority delegated to it by law in issuing the order in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55. Intervener denies each and every other allegation contained in section IX of the complaint and in paragraphs (a), (b), (c), (d), (e), (f), (g), and (h) thereof. On the contrary, intervener avers that said decision of the Commission, in so far as it consists of findings of fact, is supported by substantial evidence and that the conclusions of law stated by the Commission therein are correct; and that there is no basis in fact or in law upon which said report and order of the Interstate Commerce Commission may be vacated, set aside, annulled, or enjoined by this court.

Wherefore, having fully answered the complaint, intervener prays that the relief therein prayed be denied and that the complaint be dismissed with costs to the intervener and that the intervener have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Ross Dean Rynder,
Ross Dean Rynder,
John P. Staley,
John P. Staley,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

December 24, 1946.

144 STATE OF ILLINOIS,
County of Cook, ss:

CERTIFICATION OF SERVICE

I, John P. Staley, Attorney for the intervenor, Swift & Company in the above entitled action, hereby depose and say that on the 24th day of December 1946, I served the attached answer upon each other party to this action by depositing a copy in the United States Mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Mr. M. S. Farmer, 802 Engineers Building, Cleveland 14, Ohio; Mr. E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.; Mr. R. R. Pierce, Chief Assistant General Attorney, New York Central System, 1324 West Third Street, Cleveland 13, Ohio; Honorable Thomas C. Clark, Attorney General of the U. S., Washington, D. C.; Honorable Don C. Miller, United States District Attorney for the Northern District of Ohio, Federal Building, Cleveland, Ohio.

Witness my signature this 24th day of December 1946.

JOHN P. STALEY.

Subscribed and sworn to before me, the undersigned Notary Public in and for Cook County, State of Illinois, this 24th day of December 1946.

[SEAL]

JEAN J. SMITH,
Notary Public.

My commission expires January 15, 1948.

147 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Civil Action No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil Action No. 24479

THE CLEVELAND UNION STOCKYARD COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Arguments had before Honorable Florence Allen, Honorable Paul Jones, and Honorable Emerich B. Freed, Judges, on Tuesday, February 25, 1947

Appearances

Mr. Dwight B. Buss, For Plaintiff The Baltimore and
148 Ohio Railroad Company; Mr. George H. P. Lacey, and
Mr. Andrew P. Martin, For Plaintiff The Pennsylvania
Railroad Company; Mr. Willis T. Pierson, For Plaintiff The
Erie Railroad Company; Mr. John A. Duncan and Mr. Perry L.
Graham, For Plaintiff The Wheeling and Lake Erie Railroad
Company; Mr. Leo P. Day and Mr. Robert R. Pierce, For Plain-
tiff The New York Central Railroad Company; Mr. Ross Dea
Rynder and Mr. John P. Staley; For Swift & Company, Inter-
vener; Mr. Matthews S. Farmer, For Plaintiff The Cleveland
Union Stock Yards Company; Mr. Edward J. Hickey, Jr., Special
Assistant to the Attorney General, Mr. Wendell Berge, Assistant
Attorney General, Mr. Don C. Miller, United States Attorney,
Mr. Francis B. Kavanagh, Assistant United States Attorney, Mr.
Daniel W. Knowlton, Chief Counsel, For the United States; Mr.
Gordon C. Locke, Attorney, Mr. Edward M. Reidy, Assistant
Chief Counsel, For the Interstate Commerce Commission.

150 Tuesday, February 25, 1947, at 10:00 a. m.

The CLERK. If the Court please, we have for consideration the case of The B. & O. Railroad Company against the United States of America, in Case No. 24435. There was a motion filed just a minute ago to strike from the answer of the Intervener, Swift & Company.

Mr. KAVANAGH. It may be stipulated, if it please the Court, that these cases be consolidated, and the record will be sufficient for either or both.

Judge ALLEN. It is so ordered. Every member of the Court has made some examination of these briefs and of the record. We have all read the order and the consents in the case, and have given examination to the briefs of the various parties.

With that in mind, and considering that after all there is a single question to be presented—it has ramifications, but it is one question—we want to ask Mr. Farmer how long he wants to argue. How much time do you want, Mr. Farmer?

Mr. FARMER. If the Court please, I should like an hour for presentation of the case, and an hour to answer the defendants' briefs.

Judge ALLEN. How much time would be necessary for the gentlemen, who, although they are separate parties, are adversary to the Union Stock Yards Company?

151 Mr. REIDY. I believe an hour and a half ought to be ample for the defendants in this case—not over an hour and a half. We will try and shorten it.

Mr. PIERCE. If the Court please, on behalf of the railroad plaintiffs, we should like some time here to present our part of this. There are two cases.

Judge JONES. Of course, they have been consolidated, and as a matter of fact they both involve the identical issue to be considered.

Mr. PIERCE. That is right.

Judge JONES. While the question may be difficult, the facts are not in dispute, and there is, as I see it—and as Judge Allen suggested—a single issue, although it may have ramifications. For that reason, the Court is not disposed to allow a long period of time, especially when it has been so adequately briefed, and where the Judges have already read not only the briefs, but the decisions of the Commission, and the order.

Judge ALLEN. In the most complex patent cases that exist, an argument of an hour for each side is sufficient, and we have confidence in the ability of you gentlemen to state your cases succinctly.

The Court will allow Mr. Farmer a half hour to open and a half hour to close, if necessary; and we will ask the other gentlemen to state their cases in twenty minutes each. If you
152 need a little extra time, we will consider that, but try to state them in twenty minutes each.

Mr. KAVANAGH. If your Honors please, I would like to present at this time counsel representing the defendants, as well as the Intervener, who will participate in the argument, and has participated in the preparation of a case.

Edward J. Hickey, Jr., Special Assistant to the Attorney General, for the United States; Gordon C. Locke, Attorney; and Edward M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission.

For the Intervener, John P. Staley and Ross Dean Rynder, attorneys for the Intervener, Swift & Company.

Mr. HICKEY. Your Honors, may I say at this time that in an effort to conserve the Court's time as much as possible, a joint argument on behalf of the United States and the Interstate Commerce Commission will be made by Mr. Reidy.

Judge ALLEN. That is making progress.

Mr. PIERCE. If the Court please, may I at this time present counsel for the railroad plaintiffs in this case: Mr. Leo P. Day; Mr. Perry L. Graham, with The Wheeling and Lake Erie; Mr. George Lacey for The Pennsylvania Railroad Company; Mr. Andrew Martin, for The Pennsylvania; and Mr. Dwight Buss, for The Baltimore and Ohio Railroad Company.

153 Judge ALLEN. Do counsel wish to introduce the record at this time?

Mr. PIERCE. On behalf of the railroad plaintiffs, I would like

to offer at this time the record of I. C. C. Docket 28714. That includes the transcript of the testimony and the exhibits, and also a copy of the Complaint of Swift & Company, filed in that proceeding, which have been certified by the Commission.

Mr. KAVANAGH. I would like to supplement that record, if your Honors please, by introducing copies of the two oral arguments that were made before the Interstate Commerce Commission in these cases. There were certain admissions or statements made in the oral arguments before the Commission, that we have cited in our brief, and we would like to have some factual background.

Judge FREED. Were those included in your briefs?

Mr. KAVANAGH. Reference to certain statements that were made in the oral arguments is made in our brief, and without this record of the argument before the Commission, there is no way for the Court to check the accuracy of those statements made in the brief.

Judge ALLEN. No objection to them? They may be received.

154 Mr. FARMER. If the Court please, I should like to request that the record which has been certified from the Commission be also applied to the case in which the Cleveland Union Stock Yards Company is plaintiff.

Mr. KAVANAGH. No objection. It isn't necessary to introduce a different record in each case.

Mr. FARMER. Further than that, in view of some admissions that were made by counsel on the other side before the Commission, I should like to introduce the transcript of the minutes of all arguments.

Mr. KAVANAGH. That is already in.

Mr. RYNDER. I should like to have added to that record the petition of the railroad defendants before the Commission—the plaintiffs in this case—seeking reconsideration by the Commission, and the reply of the Intervener, Swift & Company, for the reason that those brought to the attention of the Commission a certain tariff which was attached to our reply and which the railroad defendants are seeking to have stricken from our answer in this Court.

Mr. PIERCE. We should like to object to the introduction of that.

Judge ALLEN. It may be received.

Mr. PIERCE. Exception, please.

Judge ALLEN. Anything else?

155 Mr. KAVANAGH. As a matter of convenience, and not as a part of the record, we have attached to our brief a little map showing the outlay of the plan here, and I have separate copies of the same map. I thought maybe it would be a matter of convenience for the Court to have these outside the brief, and I have some extra copies.

Argument of Mr. Farmer

Mr. FARMER. If the Court please, I shall not take up any time to make a statement of this, because the Court has already indicated that each member has read the brief, and I think the brief very fully states the facts and the issues involved in this case.

I do want to point out on the map here [indicating] the general location of the Cleveland Union Stock Yards Company, plainly identified on this map.

Over here is the main line of the C. C. C. and St. L. Railroad Company, the Big Four, which is leased from the New York Central. The C. C. C. and St. L. is not in this, except through the New York Central. The New York Central being the lessees, that now becomes a part of the main line of the New York Central Railroad.

This [indicating] is West 65th Street, and the New York Central, slightly south of Clark Avenue crosses West 65th Street on the bridge.

This track, outlined in yellow, 1,619 feet, which for convenience is quite often referred to in the briefs and in the pleadings
156 as Track No. 1619, is on the property of the Cleveland Union Stock Yards Company, and the track is owned by the Cleveland Union Stock Yards Company. It is slightly west of West 65th Street, and, as I say, it is on the land of the Cleveland Union Stock Yards Company, which is a very valuable parcel of land bordering along West 65th Street in the stockyards district. We believe the Commission's decision would unconstitutionally take that property for Swift & Company—not actually, for public use, but it would take that property for a private use; that is, the use of Swift & Company, and if any public question is involved in it, it would also take that, or appropriate it without proper judicial proceedings, for the benefit of the public, without just compensation.

The Commission has not fixed any compensation, and I would not have this Court believe that we are under any impression that the Commission could fix any compensation.

It is very definitely the opinion of the plaintiff, the Cleveland Union Stock Yards Company, in this case, that the Commission has no jurisdiction whatever over the stockyards, which is not a common carrier, which operates under the Packers and Stock Yard Act, Title VII, and Section 182 to 202, I think—something like that—and is accounting to the Secretary of Agriculture for its method of carrying on business, so far as the stockyard service is concerned.

But outside of the stockyard service, it has certain
157 private property which it is privileged to deal with as any

private corporation or individual could. It is our contention in this case that we have dealt with it as a private concern, and under private or conventional side track agreements, and there has been no time in the history of this whole controversy, dating from 1899, when that track was built, to the present time, when permissive use has not been granted to the New York Central Railroad by virtue of the conventional side track agreement, and which at all times the stockyards company reserved the right to cancel.

That is important, because the Commission, while it seemed not to dare to hold that there had been a public dedication of this land and the track over the land, to the public, did make a very peculiar statement that it had been devoted to public use for a number of years.

A devotion to public use—a permissive use—which at all times the stockyards controlled and exercised control over—is a far cry from dedication, or proscriptive rights, or a right which arose by reason of adverse possession.

There has been in this brief no authority cited upon that question of a proscriptive or adverse right which has been created here, because the Commission itself had constantly found
158 that the stockyards company reserved and maintained control of that track, and the ownership of it, and everything else, and that it was subject to cancellation at any time the stockyard company desired to cancel it, in accordance with the plain terms and provisions of the contract.

In 1935, the Commission has indicated in its report and findings that there seemed to be no question but that the stockyards and the railroads had not considered that there should be any compensation in reference to the track, because from the very beginning they had not mentioned it.

The Commission overlooked the fact that in 1935, because Swift & Company were at that time receiving some livestock over the track, the President and General Manager of the stockyards company gave the railroad notice of cancellation, as it had a right to do, under its contract.

Then there began the question of negotiations for a new one, and finally one section of the contract was amended so that the track could be used for these various other packers who were located down in here (indicating), and who enjoy receiving carload freight, except delivery of livestock. There are, I think, seven of them down in here who do receive and enjoy delivery of carload freight by the railroad company, with the consent of the stockyard company; so that the negotiations finally led to an amendment of that sidetrack agreement, so that the railroads
159 could use the sidetrack, subject to cancellation always

and subject to that retention of control and ownership by the stockyard company, so that the railroads could continue to use the sidetrack for everything except competitive business.

Now, those words were used in that contract, and much is being said and made of the use of the words "competitive business"; whether or not Swift & Company is competitive with the stockyards; and that has nothing whatever to do with this case, for the reason that the New York Contral and the stockyard company, the contracting parties, understood and construed those words, "competitive business," to mean that they could not haul livestock in carload lots for delivery to Swift & Company. That was the plain understanding of the railroad and of the stockyard company, who were parties to that contract.

From the very inception of this case before the Interstate Commerce Commission, the Cleveland Union Stock Yards Company has taken the position that the Commission had no jurisdiction over it or over its business. It does not own a locomotive or a handcar, or any rolling stock, or anything of that sort.

There are no common carrier phases in it. In fact, I think the other side concedes that it is not a common carrier; so that the contention of the stockyard company in this matter has
160 been, as I say, from the very inception, that the Interstate Commerce Commission had no jurisdiction over the Cleveland Union Stock Yards Company, and over the business it carries on.

I think that we should go to that question of jurisdiction the very first thing. On page 7 of the stockyards' brief, I have quoted Section 1, which states: "The provisions of this Chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for continuous carriage or shipment." And then the terms "common carrier" and "railroad" are defined in Section 1 (3) of the Interstate Commerce Act as follows: "The term 'common-carrier' used in this Chapter shall include all pipe line companies, express companies, sleeping car companies, and all persons, natural or artificial, engaged in such transportation, or transmission, as aforesaid, as a common carrier for hire."

"Wherever the word 'carrier' "—and this is important, because of Section 1, which I just read—"wherever the word 'carrier' is used in this Chapter, it shall be held to mean a common carrier."

"The term 'railroad' as used in this Chapter shall include bridges, car floats, lighters, and ferries, used by or operated
161 in connection with any railroad, and also the road in use by any common carrier, operating a railroad, whether

owned or operated under a contract, agreement, or lease, and all switches, spurs"—and I particular call the attention of the Court to the fact that the word "spur" is used in the definition of railroad, because that is involved in this lawsuit, whether or not that is a spur, and whether or not by reason thereof Section 1 (22) of the Interstate Commerce Act does not exclude it from the jurisdiction of the Interstate Commerce Commission, it being wholly located within the State of Ohio, and not outside the State.

Continuing—"tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property, designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property."

It will be observed that those sections which I have read specify and particularly name certain companies—express companies, pipe line companies—but nowhere do you find a stockyards company named.

The Supreme Court of the United States has delivered a number of opinions in reference to the jurisdiction of the Interstate Commerce Commission.

In the case of The Pennsylvania Railroad vs. The
162 Public Utilities Commission of Ohio, which involved, down in the Youngstown and the Ohio River district, the transportation of coal from mines of the Pennsylvania by privately owned barges and railroads to a certain point in Ohio, where it was screened and washed, and then sent out on transportation, the Supreme Court of the United States held in that case, 266 U. S. 170, L. ed. 1130—on page 171 of United States Reports, and on page 1132 of the latter—as follows:

"Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of coal is to be classified as commerce, or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by Federal commission. The Interstate Commerce Act is aimed at common carriers exclusively."

That is the holding of the Supreme Court. I shall not continue with this case, although I have it in my brief, because it will take too much time.

However, there is the contention of the Cleveland Union Stock Yards Company in this case that under the plain terms of Section 1 (1) and Section 1 (3), the Cleveland Union Stock Yards Company is not subject to a regulation by the Interstate Com-
163 merce Commission, and I might say at this point that dur-

ng the course of this case we shall demonstrate, if it isn't demonstrated by the record, that the Interstate Commerce Commission has plainly and unqualifiedly and arbitrarily regulated the Cleveland Union Stock Yards Company. Relying on Section 12 of Title 49, they have apparently concluded that under and by virtue of that section, notwithstanding the plain definition and the plain law laid down in Section 1, that it has a right to regulate the Cleveland Union Stock Yards Company merely because, by the ownership of that track, it has some interest in the controversy. It, with the other carriers—with the carriers, rather; I don't want that to be taken as an admission against interest—The Cleveland Union Stock Yards Company with the carriers has been ordered to cease and desist from refusing to deliver livestock to Swift & Company. Compliance with the order that was issued by the Commission would be absolutely impossible. I don't know what the Commission expects us to do; whether it expects us to get out and buy rolling stock and equipment, and locomotives, and all of those things that go with the operation of a railroad or not. I don't know what they mean by any such wording of the order as it is there.

In reference to this question of a sidetrack agreement, the Commission has very definitely held—210 I. C. C. 453—that the
164 Commission has no power to enforce the performance of a sidetrack agreement; and the Cleveland Union Stock Yards Company takes the position here that that rule still obtains, and that the Commission is prohibited not only from enforcing a sidetrack agreement, but, by the same token, it cannot order the stockyards what to do in violation of it.

Judge ALLEN. Mr. Farmer, your big question here, or your big difficulty, is the question as to whether the Elkins Act applies to your situation, isn't it?

Mr. FARMER. That is right. I don't think that is the big question, at all, though.

Judge ALLEN. Is it a big question?

Mr. FARMER. They have tried to make it a big question. The Interstate Commerce Act itself has stated that what is subject to regulation is a common carrier by railroad.

Judge ALLEN. But the Elkins Act says that where such actions are instituted before the Interstate Commerce Commission, or in the District Court, it would be lawful to include as parties persons interested or affected by the rate-regulation practice. This is a practice, isn't it?

Mr. FARMER. No; your Honor. I think that that statute, first of all, is very loosely drawn. I think anybody will admit that.

Judge ALLEN. Your company, The Union Stock Yards, is a person interested in the practice under consideration, isn't it?

Mr. FARMER. The only interest The Cleveland Union Stock Yards Company had in this case was to let the railroads have this under a conventional sidetrack agreement.

Judge ALLEN. If you are that interested, if you are that kind of a person, then you have here a statute which specifically provides that orders and decrees may be made with reference to you.

Mr. FARMER. Your Honor, if you carried that out——

Judge ALLEN. That is true, isn't it? If this statute applies to you, if you are a person interested in the practice under consideration, then an order or decree may be made with preference to you, may it not, specifically?

Mr. FARMER. I do not think so.

Judge ALLEN. This statute specifically so provides.

Mr. FARMER. That statute says that; there is no question about that.

Judge ALLEN. And it was enacted subsequent to these other provisions.

Mr. FARMER. I am covering that subject later on.

Judge ALLEN. It was an act enacted subsequent to the other provisions, was it?

Mr. FARMER. I think when it was enacted the other provision was there. I am not sure about that. I haven't checked the dates on it. But I think this, that if you carry that to its logical conclusion, you could have the Interstate Commerce Commission regulating anybody that dealt with the railroad in any respect.

Judge ALLEN. Mr. Farmer, I haven't made any conclusion about this, but it is very much better for you to know what question is in the mind of the Court.

Mr. FARMER. I understand that, your Honor.

Judge ALLEN. If this statute does apply to you, I want to ask you this question: whether the cases that you cite and rely upon were dated prior to or after the enactment of the Elkins Act?

Mr. FARMER. I think all of them, as a matter of fact, were after. One of them was the General American Tank Car Corporation case, which I think was in 1940, for instance. It is in the brief, and it very clearly holds that the Commission had no jurisdiction whatever over those companies who owned cars and equipment rented to the railroad.

Incidentally, I am just informed that you were in this case that we discussed here a minute ago in which the Supreme Court holds that the Interstate Commerce Act—that was a recent decision, by the way, and I am sure subsequent to the enact-

ment of '42—the Supreme Court holds in that case, which I read to you a few moments ago, that the Interstate Commerce Act was aimed exclusively at common carriers. There wasn't any question about it.

Judge ALLEN. There isn't any question about the Elkins Act, either. That was enacted when Senator Elkins was in the Senate of the United States, in 1937 or 1938.

Mr. FARMER. Now, on page 11, I have cited the Refrigerator Car Mileage case, and you will find there that the Interstate Commerce Commission itself has held that it has no authority to regulate or to fix a price in those instances. I am speaking of people who owned cars and rented them to the railroad, like refrigerating cars. The Interstate Commerce Commission said, itself, in that case that it had no authority to regulate, and even though Congress had amended the Act, they went into a very long discussion of that.

Judge FREED. Mr. Farmer, what does that provision in the Elkins Act mean?

Mr. FARMER. I think it means, really, honestly, to merely apprise those who are interested of what is going on. That is my notion of it.

Judge FREED. To be called in order to state their position, but not to adjudicate the matter with reference to them?

168 Mr. FARMER. I don't think there is any question about it, your Honor.

With reference to that extract on Page 11 of the brief, surely a refrigerating car company furnishing equipment to a railroad is a party in interest, just as a stockyards company who, under a conventional sidetrack agreement, lets the railroad operate its cars over its track, and yet the Commission has held very definitely that it could not fix a compensation, so that if Section 42 applies in all the aspects that may be gleaned by some of them—particularly the Commission—then the Commission would have authority to go into that question of what the refrigerator car company could charge the railroads for its equipment.

There are a number of cases here. There is the case of the United States vs. Pennsylvania Railroad Company, 242 U. S. 208, which they cite here as authority for the stand they take that the stockyards company cannot be regulated.

I have just been handed, in connection with this argument, a note by one of my associates which says, "The Elkins Act is applicable to all persons, whether or not carriers. The Interstate Commerce Commission has the enforcement of the Act as to carriers. The District Court has the enforcement as to other

169 types of persons or corporations." That is the opinion of one of my associates, that the Interstate Commerce Com-

mission cannot regulate anybody but the carriers, and if there is any controversy with persons outside of common carriers, then it must be left to the judicial tribunal.

In the case of the Rex Jellico Coal Company vs. L. & N. Railroad Company, which was decided January 10, 1940, the Commission held that service over private tracks by a common carrier was neither compelled nor prohibited by the Act; that to furnish it or withhold it was within the discretion of the carrier, except that in either event the statutory inhibition against unjust discrimination, or undue prejudice, must be observed.

I might say to the Court that in 1940 the Congress amended the Act so that some of these private car companies now are subject to the jurisdiction of the Commission, that the Commission can fix the price that they receive. In that connection, if the Congress of the United States, knowing that Section 42 was in existence—Section 2 of the Elkin Act—if the Congress of the United States enacted an amendment so as to give the Commission the authority to fix the compensation to carriers, whether or not common carriers, then, if Congress had been under that opinion, it wouldn't have been necessary at all to amend the Act. They would have
170 been subject to it all the time, by Section 42. But Congress has done nothing about amending the Act so as to make a private side track of this kind subject to the Commission, when it is owned by a private company and not a common carrier.

I shall pass on now to the case of Sholl Brothers vs. Peoria & P. U. Railway Company, 276 Ill. 267, 114 N. E. 529. That is a case that is on all fours with the one in controversy here.

Judge FREED. That case was cited?

Mr. FARMER. This case was cited, in all the briefs; yes. You think it is not necessary to go into that? Is that the point?

Judge FREED. It just seems to me that it has been cited, and I read it.

Judge JONES. I don't remember it, but I can read it again.

Mr. FARMER. In that case there was an agreement entered into with the defendant, the railroad company, under the terms of which the latter agreed to put in a sidetrack for a coal mine owned by Sholl Brothers. The labor, some material, and the right of way were furnished by the Sholl Brothers. Other material was furnished by the carrier, who was also to maintain the track. The use of the track was restricted against serving other coal mines, or business which would interfere with the busi-
171 ness of Sholl Brothers. That is the situation that is involved here.

An asylum—a State institution—was built nearby and tracks were laid by it and connected with the sidetrack that Sholl Brothers had built on their land. The carrier delivered to the

asylum carloads of coal, not produced at the Sholl Brothers mine. Sholl Brothers filed a bill to enjoin delivery of the coal not mined at their mine. By way of defense, the defendant urged that the contract was void and against public policy for the reason that a common carrier had no right to contract to give the exclusive right to transfer any commodity over any part of its line.

The Court, however, said, "It must be remembered, in this connection, that the railroad company does not own the right-of-way.". That is the same situation as the stockyards. "The fee in the land and right-of-way is owned by the defendants in error, and the right of the railway company to use the tracks and right-of-way is restricted to whatever rights it has by the terms of the contract.

"The sidetrack involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway, but not a part of it, and could not become a part of the railway system of plaintiff in error, unless it be purchased or acquired by condemnation proceedings."

172 That is the situation in this case.

Judge ALLEN. Mr. Farmer, you have consumed 30 minutes.

Argument of Mr. Pierce

Mr. PIERCE. If the Court please, I have made a copy here of Exhibit No. 11 in the Interstate Commerce Commission Docket Proceeding 28714, one for each member of the Court, because I expect to refer to it in the argument.

There was quite a bit of uncertainty at the first hearing before the Commission as to just what the facts were about this track, and how service got started over to Swift's. In the first place, Swift couldn't turn up any evidence on it, and some of the records had been destroyed in the floods down at Cincinnati—some of the Big Four records. We were able to find a file, though, referring to the Peoples Packing Company, which was in the Traffic Department here at Cleveland, and that file gave quite a bit of history of how they happened to get the track to Swift & Company's plant on West 63rd Street.

As a result of the contents of that file, this Stipulation No. 11 was prepared, and that shows that in 1905 Swift bought the Peoples Packing Company, which was located down in here [indicating] at that time. It was operated as the Peoples Packing Company by a man named H. C. Thom.

173 Swift wanted to enlarge its facilities there, and they gave quite a bit of consideration to how they would get a track connection in there. In the record is an agreement of 1908 between H. C. Thom and the Big Four Railroad, which was

obtained at the instance of Swift & Company, in which a 16-foot right-of-way was obtained at the request of Swift & Company. Swift & Company had H. C. Thom working for them at the time, operating the Peoples Packing Company plant, so Thom made an agreement with the Big Four to convey a 16-foot of right-of-way all the way down the westerly side of West 63rd Street, extending from Lot 285 up here at the northerly end, down to Lot 255, where the track would serve the industries at that time.

At the same time, Swift & Company asked the Big Four to get a track connection for them up at the north end of West 63rd Street, and a permit was obtained from the City of Cleveland—the Council—to build a track across West 63rd Street up here [indicating] and to make a track connection directly with the main line right-of-way of the Big Four Railway.

The Lake Erie Provision Company enjoined that proceedings. Condemnation proceedings followed. The Court assessed the damage at $13,500 for the value of the property, which was to be taken in order for Swift to get its direct track connection up here with the Big Four, which would have given Swift all of
174 the rights to which it now claims, and as the Commission would undertake to give it under Section 1.

In 1910, Swift concluded it didn't want to pay what was necessary in order to get its own direct track connection at the north end of West 63rd Street, where it couldn't have any interruption by the stockyards or any other interests, so Swift & Company, as will be shown in this Exhibit 11, then asked the Big Four Railroad if they wouldn't get them a connection that was served by this stockyards track, along the westerly side of West 65th Street, and Swift & Company provided to the Big Four Railroad the right-of-way from this Sublot 255, across here, on over here [indicating], in order that a track could be built to Swift & Company's plant by using this bridge track.

This [indicating] is comparable to a bridge so far as livestock is concerned. It is a bridge over which cargo shipments of livestock, so far as the railroad is concerned, cannot be taken to Swift & Company's plant, because we have only a restricted use of that track.

Swift arranged all of this right-of-way in here [indicating] for the Big Four Railway, and asked them to build a track connection across here. Swift & Company obtained a permit from the City of Cleveland for the Big Four to build that track across West 65th Street.

It obtained an easement over this little Sublot 166, which
175 is shown in yellow here [indicating], and which just borders the easterly side of West 56th Street. That sublot was owned by the Cleveland Union Stock Yards Company, and Swift

& Company procured this easement over that sublot for the Big Four to build the track. One of the conditions in the easement for that little Sublot 166 was that if Swift ever gave up going over that way to get out with its traffic, that the easement would revert to the stockyards company.

This track shown in yellow [indicating] is a track owned by the stockyards. At the south end of that track, the Big Four did build, at the instance of Swift & Company, a track on down here [indicating] so that they could switch back and get across here to get to Swift & Company's plant, and the other industries that were located over there—mostly packing plants.

However, only two of those plants received the carload shipments of livestock at their plants. That was Swift & Company and Koblenzer Brothers. They were the two companies which received livestock at their plants over in this section.

This track, indicated in red here, is owned by the Big Four Railway, or the New York Central, but it was put in at the instance of Swift & Company in order to get to their track. The land is partly owned by Kreinberg and Krasny, and the Standard Beef Company.

176 When the stockyard sold this parcel of land and marked No. 8 right here [indicating] to the Standard Beef Company, it retained an easement to continue a sidetrack over there so as to permit these people down in there to have this service by rail.

The same thing happened with Kreinberg and Krasny. When the stockyards sold them land, they reserved the right for this sidetrack to be maintained over there.

Swift & Company was a stockholder in the stockyards and had its manager on the Board of Directors. Mr. Baker, President of the stockyards company, testifying before the Commission said that Swift & Company took an active part in the management of the stockyard company from 1916 to 1936; so that Swift & Company has known all the time that this was a restricted track, restricted to movement of only such commodities as the stockyards would permit to be moved over that track.

The stockyard has never objected to moving anything except carload shipments of livestock, and the objection that the stockyard made to us was that if livestock moves over this track of Swift & Company, then the stockyards does not get to unload that livestock through its unloading pens, so that, for that reason, they considered it competitive.

177 There is an exhibit in the record which shows that there was no question about what competitive traffic was understood to be by all parties concerned, and that was at the time in 1935 when the stockyards said that we should not move any more

carload shipments of livestock to Swift & Company over that track.

Prior to 1930, Swift didn't get any livestock over that track. Swift got all of its livestock through the unloading pens of the stockyards. In 1931, when the Government filed an action against Swift and compelled Swift to divest itself of ownership in stockyards, including the Cleveland Union Stock Yards, Swift then started sending some of these carload shipments of livestock directly to its plant. In other words, there was just a little bit of imposition in using the stockyards track there in order to get carload shipments over to its plant.

There were 1,116 of those cars that moved over there between 1930 and 1935. It got to be such a volume of traffic that the stockyard felt that it was affecting their revenues. In other words, it was taking stock away from the loading and unloading pens of the stockyards, and taking it directly to Swift's plant. So the stockyards said to us, under this sidetrack agreement, "You can't do that any more unless a charge is paid to the stockyards for the use of that track, for livestock." The price quoted at that time on a per head basis was $6 to $9 per car, ranging
178 all the way from 20 cents a head on cattle, on down to 5 cents, I believe, on hogs.

Then they said that some price would have to be arranged. Well, we attempted to arrange a price for the use of it. Swift & Company complained and said that they wanted their stock shipped over there, and we told them we couldn't move it over this track until they got permission from the stockyards to use this track in order to move their livestock over to the plant; that we weren't able to do anything with the stockyards, and we thought that they ought to be in a better position than we were to deal with the stockyards on that matter.

So that resulted, in 1938, in a request from the railroad—the Big Four—to all of these industries who had sidetrack agreements with us, including Swift & Company, if they would not change their sidetrack agreements. We asked them to modify the provisions of the sidetrack agreements, so as to indicate that livestock could not be moved over that track, because that was the restriction that was put upon our operation over the 1,619 feet of track.

Three of the industries came back and said, "All right. We accede to the change." Koblenzer Brothers said, "We are not moving any livestock over there now, so it doesn't make any difference to us." Two of them, Kreinberg and Krasny, and Theurer-Norton, didn't reply.

179 Swift & Company wanted to make an issue of it, apparently, because they said, while they were not using the track for moving carload shipment of livestock, that they did want

it available in case there was a fire, or strike, or something, at the stockyards. We called their attention again to the fact, as they well knew, and had known all these years, that we were helpless and couldn't guarantee them any service over that track.

Now, all of this long history—which is included partly in Exhibit 11, but in the transcript of testimony it goes back quite a ways—all of this long history was ignored by the Commission here, which was very much contrary to what was done in the long and extensive argument with the stockyards in Chicago, in which Swift & Company was a participant, along with other packers and railroads and stockyards. In the Chicago Stock Yards case, the Supreme Court of the United States held that the history of the practices that had grown up over there were indeed important in considering who was entitled to what, and where the transportation obligation of the railroad began and ended with reference to loading and unloading livestock. So it is the history in cases of this type that the Supreme Court has held is of vital importance in considering the rights to service, and what is transportation service. That case is the Supreme Court case, 316 U. S. 216,
180 referred to on page 26 of our brief.

I assume that the Court has observed the location—it is not shown on this map—of the other three packing houses which Swift claims, and the Commission says, we are discriminating against. The Long Dressed Beef is located over here north of the Big Four Railroad [indicating], and has its own private sidetrack built up to our right-of-way and connecting directly with our main tracks. That is the Long Dressed Beef.

The Ohio Provision Company is located north of the Big Four tracks and east of West 65th Street, and has its own private sidetrack, for which it paid to build it up to our right-of-way, so as to connect directly, and so that we could be compelled to serve them under Section 19 of the Interstate Commerce Act.

The Lake Erie Provision Company, located just south of our tracks, and just east of West 65th Street, likewise has its own direct track connection with the Big Four main track and right-of-way; just as Swift had its opportunity in 1908 and 1910—and the opportunity existed for years, and may yet be available for Swift; I don't know about that—they had their opportunity to get their direct track connection at the north end of West 63rd Street.

With that history, we have not been able to understand in what way the Commission legally could require the
181 railroad to provide Swift & Company with a track connection to our main line. We have been restricted in what we can move over that track. Livestock is the only thing that is taboo, and that is taboo because the owner of the track says it is competitive to the operation of the stockyards.

I should like to make sure at this point, if the Court please, that the order of the Commission is probably before the Court. I believe it was attached to the answer of the Interstate Commerce Commission.

Mr. REIDY. Yes; it has been amended since then. It has been extended now, as Judge Jones perhaps is aware, until the 1st of June, but we are perfectly willing to supplement the record to show that.

Judge JONES. I didn't send notice to the parties about that because it was purely for the Court's benefit, to give ample time to consider the case, without changing the hearing date. The Commission responded and has extended the effective date, but not for any purpose other than the convenience of the Court.

Mr. PIERCE. Thank you very much.

I just wanted to be sure that the order was in the record properly.

Judge JONES. That is the amendment; yes.

Mr. PIERCE. I should like to say, without further discus-
182 sion at this time, that we have discussed at length the law which we think is most likely to be applicable under the circumstances here. We doubt if there is anything that is just on all fours with this situation, but we have just cited the cases which the Commission ignored in its consideration, and in its order there isn't any reference made to any citation of the railroad plaintiff's at all—not one citation being used. The railroad's contentions here apparently were just brushed aside, with the idea that Swift & Company must have service over that track. So we have cited these cases in our brief, and I would like to save any time that may remain for rebuttal.

Mr. REIDY. It may be that Swift & Company might want about 15 or 20 minutes.

Judge ALLEN. You are speaking both for the Interstate Commerce Commission and the United States?

Mr. REIDY. Yes.

Judge JONES. We will take a little recess.

(Recess.)

Argument of Mr. Reidy

Mr. REIDY. If your Honors please, when the railroads filed this suit and copies of the Bill of Complaint were served upon the Commission, we were somewhat surprised that the railroads had attacked the order of the Commission, in view of the expostulations made by their counsel before the Commission, which are quoted on page 70 of the Commission's report in this case.
183 Mr. Pierce, in arguing the case to the Commission, said:
"It does not make any difference to the New York Central

whether this stock is placed at the stockyards unloading pens, or whether it is placed over at Swift & Company's plant. We stand ready to deliver at either place, but because of the barrier placed on this by the stockyard, the owner of the track, we are just not able to deliver over there."

In their brief that they have filed in this case, at page 29, they in effect reiterate that same statement. That is at page 29 of the plaintiff's brief, the last full paragraph on that page, beginning with the fourth line in that paragraph. They say: "Plaintiffs stand ready and willing to deliver carload shipments of livestock to Swift's plant whenever Swift can make satisfactory arrangements with Stock Yards for the use of its 1,619 feet of track or whenever Swift can conform to the provisions of Section 1 (9) of the Act and construct its private sidetrack to the right-of-way line of New York Central's railroad property."

It looks very much to me, from those two statements, that the railroad is attempting to take advantage of an order that is more primarily directed against the Cleveland Union Stock Yards Company. If it has any merit at all, it certainly doesn't
184 seem to have any with respect to the railroad companies, over whom it must be conceded that the Interstate Commerce Commission has jurisdiction of the most complete character.

It is well recognized by the Supreme Court of the United States—and I have not cited this case in my brief as it is a new case that I just read this morning—in the case of the Interstate Commerce Commission against Chicago, Rock Island & Pacific Railway Company, 218 U. S. 88, at page 109. The Supreme Court said that, "The companies"—meaning the railroad companies—"may complain of the reduction made by the Commission so far as it affects their revenues as one thing; to complain of it as it may affect shippers or trade centers is another." We have said several times that we will not listen to a party who complains of a grievance which is not his. I am citing that case in support of that last holding.

Judge ALLEN. What page is that, Mr. Reidy?

Mr. REIDY. That is quoted on page 109.

The facts are pretty well understood by the Court, and it is unnecessary to go into them to any great extent, but the essential proposition is that we have seven industries out on the end of this line, beyond the track of the Cleveland Union Stock Yards Company, which, unless this order is sustained, will be deprived
185 of common-carrier service, and their products will not be able to reach the outside world, or products from the outside world will not be able to come into those plants.

The Interstate Commerce Act was passed originally in 1887, as your Honors probably know, and has been amended from time

to time, and it now constitutes a volume of this size [indicating] of over 200 pages. During those 60 years, it would indeed be surprising if, in the constantly expanding nature of the law as to the Commission, that Congress had not taken care of a situation such as this, and prevented any such failure on the part of the carriers and others from according service to industries so dependent upon them for service.

As your Honor, Judge Allen, has pointed out, certainly with respect to the Cleveland Stock Yards Company, the wording of the Elkins Act, giving words their ordinary use, certainly covers a situation of this kind: "In any proceeding for the enforcement of the provisions of the statutes relating to Interstate Commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any District Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by
186 the rate, regulation, or practice under consideration," and then it provides that decrees may be entered against those parties.

Of necessity, that must mean proceedings before the Commission, because the Commission is the only body that can pass on the reasonableness of a rate or a regulation, or a practice. The Supreme Court has said time and time again, that under the primary jurisdiction doctrine, when a question involving the reasonableness of a rate, a regulation, or practice, is brought to the Court in the first instance, it will decline to pass on it and refer the matter to the Interstate Commerce Commission for expert judgment of that body upon the matter. So that I say, of necessity, as the language of the statute, of course, shows, it does apply to proceedings before the Commission.

With respect to the contention that the Act is confined largely or solely to carriers, I have already cited at page 97 of the Government's brief in this case, the case of Terminal Warehouse against Pennsylvania Railroad Company, 297 U. S. 500, 514, where Mr. Justice Cardozo—I think we will all agree that his opinions are entitled to weight—said: "The Commerce Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion,
187 it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive."

The Commission in this case has found—and we think quite properly—that this Track 1619 is so essential to the service of

several industries who are located unfortunately beyond that track, that it is an essential link in the New York Central System, and it being an essential link in the New York Central System, of course, the New York Central cannot enter into any contract as a common carrier which in any way abrogates the provisions of the Interstate Commerce Act.

Perhaps the leading case on that is the L. & N. against Mottley, 219 U. S. 347, which I have set forth in my brief. In that case, Mr. and Mrs. Mottley had been injured by a wreck on a Louisville & Nashville train, and in 1871, prior to the Interstate Commerce Act, in settlement of their injuries, the railroad agreed to give them—and they agreed to accept—free passes over that line and all its branches during the rest of their lives. When the Interstate Commerce Act was amended in 1906, it forbade the issuance of free passes in that kind of a case, and thereafter
188 the railroad declined to renew the passes, and the Mottleys brought suit in court for the enforcement of it, and it went to the Supreme Court, and the Supreme Court said that while the case would result in great hardship to the Mottleys, nevertheless, that was the policy of Congress, and that Congress had, as a matter of policy, forbidden the making of such agreements, and the fact that they were made prior to the effective date of the Act did not excuse or preclude Congress from acting on them. Otherwise, as Justice Hughes said, the parties by prophetic discernment could remove themselves from future legislation. For example, in the last annual report that the Interstate Commerce Commission has made to Congress, acting under the mandate imposed on it by Section 21 of the Interstate Commerce Act, they have made seventeen recommendations for legislation. The annual report is a public document and everybody can get copies of it, and be familiar with those recommendations. Now, of course, it goes without saying that no one who reads those recommendations for legislation could anticipate that Congress may act favorably on those recommendations and then agree that if this law is passed, or those laws are passed, that they could excuse themselves or relieve themselves from it.

Just as in the Morgan case, while the question there involves a small and unimportant railroad—I don't mean by that
189 that the New York Central is a small and unimportant railroad—the issues are relatively simple, but we think the principles that result from these issues are far reaching, applying as it would, to situations all over the United States.

It is well recognized in the Interstate Commerce Act itself, in the very definition of "railroad," which is set forth on page 106 of our brief, that the railroads don't own all the miles of track over which they operate. There are a good many miles of rail-

road in this country where they operate under trackage rights, and perhaps over private facilities of other than railroad companies, and that is recognized by the very definition of "railroads."

In the middle of page 106 it says: "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating the railroad,"—and the following words are the significant words: "whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

It would be difficult to find language much broader
190 than that definition of railroads.

In the case of Alton Railroad vs. Illinois Commission, 305 U. S. 548, cited on page 90 of the Government's brief, the Supreme Court there said specifically: "The appellant"—that is, the railroad company—"maintains that by compelling it to expend its funds for the upkeep of a track not constructed or owned by it"—note those words, "or owned by it"—"and upon land it does not own, the order is repugnant to that provision of the Constitution."

In deciding that case, the Court said, "A track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large." That language shows that it isn't necessary for the railroads to use every mile of track over which they operate.

The facts with respect to the construction and maintenance of Track 1619 and the assessment of the extra charge of $6 to $9 per car, if the tracks of the Union Stock Yards are used to complete the common carrier's service to Swift & Company, are all fully covered in the Commission's report and need not be referred to here.

191 There is no question in this case, and I don't see how there could be any, as to a full hearing having been accorded. The Commission had, in fact, two arguments before it, as well as two hearings before their examiners, and the matter was threshed out very fully in briefs and examinations.

Judge Jones. Mr. Reidy, I don't want to interrupt you more than necessary, but there is, since you mentioned it, a gap in the opinion of the Commission, as I see it, in this respect: If it has jurisdiction of the stockyards company and power to order it, as

it can readily do so, what consideration was given to the question of the cost to the railroad in performing the service over the private track, in relation to the preferential treatment of Swift & Company over others who had their own switch connections to the railroad? I am referring to these other companies who have stockyards that are served by private sidings.

Mr. REDY. Your Honor's question, I think, goes directly to the finding of the Commission as to a violation of Section 3 (1), the unjust discrimination, under the undue preference section of the Interstate Commerce Act. The Commission also made findings as to violation of Section 1 (9) relating to the maintenance and operation and building by railroads of switch connections.

It is not enough for a railroad to just build a switch con-
192 nection, but it has got to maintain and operate it.

Judge JONES. Does that include a payment to the owner of the track, and is that passed on to the person served, or is that absorbed by the railroad? And is the railroad, in that situation, compelled to absorb the extra cost of serving Swift & Company? If that is true, wouldn't that result in a beneficial preference to Swift in violation of the law? There is a gap that I didn't think the Commission's report covered there, and here is what was in my mind: if, as you contend, the Commission has jurisdiction over the stockyard company in this dispute, and has the power to include in its order the performance by the stockyards, in harmony with that imposed upon the railroad, then would not the Commission have the power to determine at what price the stockyards should give that service to the railroad? I couldn't get away from the proposition that if the additional cost was added to the railroad's burden of serving Swift & Company, and it had to absorb that and still deliver livestock to Swift by the same line haul charges as it did to others who had the private switches, you would end up with that in dispute.

Mr. REDY. I understand that. The railroads have that completely within their sole and exclusive power to correct, your Honor, and they haven't taken that step here.

193 Now, for that added or extra cost of performing this service, they could have filed with the Interstate Commerce Commission a new tariff, naming whatever increased cost they figured they would incur by using this track, and that tariff, if it had been protested by Swift as resulting in an unreasonable rate, nevertheless, the Commission has the discretion to permit the increased tariff to go into effect at once, or, what quite often happens, following the filing of a protest, it conducts an investigation into the reasonableness of that rate.

Now, we don't say—and I want to make that very plain; and I am glad Your Honor brought it up, because I am afraid I might

have missed it, otherwise—that the Cleveland Union Stock Yards Company is not entitled to just compensation for the use of the track. What we do say is that that just compensation for the use of that track is not to be levied solely against livestock. There are all forms of transportation and traffic that use that track, and it could be prorated—whatever the value was to the stockyards company and the railroads using that track—and could be dealt with in the nature of awarding just compensation. We think that is within the authority of the Commission.

Judge JONES. One more question, and then I will cease: if the railroad did file a subsequent tariff and the Union Stock
194 Yards protested it, would the Commission have the power to determine whether the tariff filed was a compensatory rate, and would the stockyards be bound by it?

Mr. REIDY. Yes. They would, unless they got the Court to set the order aside. That is covered, I might say, by the provisions of 15 (7) of the Interstate Commerce Act, which we haven't cited in our brief, although we have cited pretty nearly every other section.

Judge FREED. May I ask you this question: What do you say about the comment made by the Commission as to the right of the Union Stock Yards to withdraw that trackage from public use?

Mr. REIDY. I say, that was just in the nature of an aside. There wasn't any such question.

Judge FREED. Do they have such right?

Mr. REIDY. I don't think they have the right, myself. Certainly, if the Interstate Commerce Act is not broad enough to stop them, if the Interstate Commerce Commission is excluded by Section 1 (22) which Mr. Farmer referred to, which provides that spur, industrial, team, switching or sidetracks are not within the jurisdiction of the Commission, then the Ohio Commission could step in, because they are operating under a somewhat analagous statute as to intrastate commerce. I think either one or the other could stop it, but the Commission never reached that point, and I think Your Honor will see why it couldn't.
195 Here was an effort to single out livestock. It wasn't a complete obliteration or wiping out.

Judge FREED. I appreciate that, but there is a reference in the Commission's report, twice, to the fact that they do not decide the question, whether or not these Union Stock Yards have a right to withdraw that trackage entirely from public use. Now, I did want to get your answer as to the question, whether they do or do not, in view of the provisions of these series of agreements between the New York Central and the Union Stock Yards. In each one of those there is reserved the right to cancel, or to terminate the contract or agreement for usage of that trackage on either

30-day or 60-day notice. I assume that that is the reason why the Commission in its report made some reference, without deciding it, to the right of the Union Stock Yards to withdraw that trackage from public use.

Mr. REIDY. That agreement was between the Union Stock Yards Company and the New York Central Railroad Company, of course. We take the position that, whatever the rights of the Cleveland Union Stock Yards Company, the New York Central Railroad Company certainly had no right to enter into any such agreement and deprive the public of a service so essential to it.

The New York Central has gotten itself into this situa-
196 tion by entering into a contract beyond its powers. The Cleveland Union Stock Yards Company, also, was a defendant before the Commission and took a very active part in those proceedings and advanced substantially the same argument to the Commission that they are today advancing to the Court. They weren't taken by any surprise in this Court. They were named as a defendant and they filed a separate Bill of Complaint here, so that any decree that the Court enters can run against the stockyards company as well as the railroad.

Does that answer your question, Judge Freed?

Judge FREED: That answers your view of it.

Mr. REIDY. The Commission, in this case, made findings of the violation of Sections 1 (9), 3 (1), and 1 (6).

Section 1 (9) requires the railroads, when a shipper tenders interstate traffic to it for transportation, to construct, maintain, and operate, a switch so that the shipper who builds his plant back from the main line or branch line of the railroad will have access to the outside world. It is significant in that connection that the carrier is required to maintain and operate that track without discrimination, and the word "discrimination" is not modified in any way, like Section 3 of the Act is, by the use of an adjective such as "undue" or "unreasonable." It forbids all forms of discrimination.

We regard that as a rather important section of the
197 Interstate Commerce Act, and the Commission was quite hopeful that the Court would discuss the importance of that section in its opinion. We feel it is a section that has not been used as much as it could, and as this case probably will go to the Supreme Court, we would like to make Section 1 (9) mean something. It enunciates a principle of law that would be applicable generally.

Take the finding of the Commission as to a violation of 1 (6), an unreasonable practice, or 3 (1), unjust discrimination. The Commission, in those cases, has to proceed case by case. They find a violation of Section 3 (1) in a situation here in Cleveland,

and after investigation they correct that; then someone complains about a situation at Akron, and after investigation they correct that; and they have to go like that all over the country whereas under Section 1 (9), if it is the duty of the carrier to maintain and operate this switch connection, as we think it is, that that is a principle of law that applies generally and would greatly facilitate the work of the Commission in the manifold duties imposed upon it.

In view of the fact that Section 3 (1) seems to be so heavily leaned upon by the dissenting Commissioner, it seems as if a word with respect to that section is advisable. Your Honors will observe from the map that I have handed up to you that there are
198 three provision companies: The Lake Erie, right along the main line of the New York Central, to the right of the map; then the Ohio Provision Company, and Long Dressed Beef Company. It is obvious from the map and from the physical lay-out that these three plants do not have to use the disputed 1,619 feet, and therefore the plaintiffs contend in this case that the circumstances and conditions are dissimilar and that there is no basis for the finding of a violation of Section 3. We point out that the words, "under substantially similar conditions and circumstances," do not in fact occur in Section 3 of the Act, which the Commission found violated in this case, although they do occur in Section 2, concerning which the Commission made no such finding.

The fact that these three so-called preferred plants do not have to use Track 1619 was a factor to be considered by the Commission along with others, in determining whether or not there was a violation of that section, and the Commission found that these three preferred packing houses were in competition and frequently had bought their livestock usually in the same origin point, and sold it in the same destinations, as Swift and the other plants who have to use Track 1619, and by those six or seven plants having to pay the extra charge of $6 or $9 a car, that they do in fact enjoy, or have imposed upon them, a prejudice, and the other
199 packing houses have a preference that warranted the Commission in making its finding as to a violation of Section 3 (1).

The decisions of the Supreme Court are so numerous that it would be tiresome to repeat them, but these questions of discrimination and unreasonableness of a practice are so administrative in nature that the Court has rightly ascribed to the judgment of the Commission great weight in the determination of those questions.

Certainly, where Swift and these other companies have to pay $6 or $9 more for a carload of livestock, depending on whether it is a single or double-deck car, and these other three plants get them without that charge, to the uninitiated it seems that would

be a discrimination. When the Commission makes a finding on that, it seems to me it makes it well nigh conclusive.

The same may be said with respect to the finding of Section 1 (6), which relates to unjust and unreasonable practices. In connection with a similar finding made by the Commission in another case, the Supreme Court, in 230 U. S. 247, said; "But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the Courts
200 should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the Courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice." That is in the brief.

I think I have touched all the principles of law in this case that are important, unless there is something that occurs to your Honors.

We have filed a rather lengthy brief here, considering the importance of the case. I hope your Honors will not consider it too long, and unless you have some questions I will conclude.

Argument of Mr. Rynder

Mr. RYNDER. If it please the Court, I am representing Swift & Company, who was the complainant before the Commission in this case, and I shall not attempt, I hope, to duplicate anything that has been said on either side.

I did want to say a word, if I may, in connection with the question asked by his Honor, Judge Jones, about just compensation for this track.

I think the Commission says in its opinion that the stockyards is undoubtedly entitled to just compensation for that track. I don't question it, certainly, but Swift is not using it. The New York Central is using it. Now, if the New York Central
201 needs additional compensation for the use of that track, the means is open to it, and it necessarily involves the primary jurisdiction of the Commission.

As Mr. Reidy has stated, the New York Central may file a tariff, naming something more than this line haul rate, for deliveries of livestock and other freight to these other industries, and the Commission would undoubtedly determine, as it has determined in a number of similar cases, whether the proposed charge was reasonable, and we would be bound by that decision, of course, whatever it might be.

I say that it did not come before the Court at this time as an initial matter, because it evidently requires the primary jurisdiction of the Commission, but I did want to mention one more point in that connection, as to whether or not the stockyards has already been receiving compensation. You perhaps recall that the first contract, shown in one of the exhibits in this case, provided that the stockyards company would pay the maintenance cost of all the tracks, but an amendment of that contract, which I believe was made in 1924, and which I think is Exhibit 11 in the record before you, provided that the railroad company would take over maintenance of all of the stockyards' tracks, which it did at that time, and has done ever since, including all of these tracks which are used solely for stockyard purposes.

Under several decisions, which we have cited in our brief,
202 the maintenance by the railroad over the years of those tracks, for another industry, is strictly forbidden by the Interstate Commerce Act, and the decisions of the Commission, unless the railroad is receiving something in the way of public service out of it, which would justify what it is doing. So I would like to call your attention to the fact that up to this time—at least since 1924—the stockyards company has been receiving a compensation which it could have received in the way of maintenance of all of these tracks, only upon the theory that it was giving the New York Central something in the way of the use of its tracks for a common carrier purpose.

I think that the Commission properly did not pass upon the question whether the track would be abandoned in its entirety, and I do not believe that this Court, under the present condition of the record, will attempt to pass upon that question, because it was not before the Commission at the time the case was decided, and I think the validity of the order of the Commission must be sustained upon the record as it stood when the case was closed.

Everybody was given an opportunity to put in all of their facts, and there had been no suggestion at that time of abandonment of the track. If that question should arise, that will again bring into play the primary jurisdiction doctrine, either with respect to the Interstate Commerce Commission, or with respect to
203 the Public Utilities Commission of this State. I will not go into it in detail, except to state that that is where we would have to go. If the Interstate Commerce Commission loses jurisdiction over the abandonment of a track—of which I am not too sure—under Paragraph 22 of Section 1 of the Federal Act, you will find that the Public Utilities Act of the State of Ohio provides as follows: "The Commission shall have the same control over private tracks, so far as such tracks are used by common

carriers in connection with a railroad for the transportation of freight as it has over the track of such railroad."

Mr. PIERCE. I would like to object at this point, if you please, to any reference to Ohio Law here. As I understand it, Mr. Rynder is proceeding under the provisions of the Interstate Commerce Act and his rights under that Act.

Judge ALLEN. You may proceed. If you gentlemen bring something extraneous into the argument, the Court will disregard it.

Mr. RYNDER. I am merely suggesting, if it please the Court and Mr. Pierce, that that question is one that we would have to take up.

Judge ALLEN. This is argument and not evidence; that is the distinction. Proceed.

204 Mr. RYNDER. As I have listened to the argument, it seems to me that I have not heard the railroad plaintiffs make any argument on their own behalf, but only an argument on behalf of the stockyards. Certainly there is nothing in this order that could injure, damage, or otherwise bring any unlawful result to the New York Central. As I get the position of the New York Central, upon its complaint in this case, and from the brief, it says: "We will be forced to make an unlawful trespass upon the stockyards' property. The stockyards can come and sue and resue and keep on suing us for damages," and this, and that, and the other thing.

That brings me to this point: I think that if the order is valid as against the stockyards, then the railroad has stated no case, because the railroad would not be a trespasser on the property of the stockyards, if the stockyards was bound by this order. Neither could the stockyards proceed to repeat its suits for damages against the railroad, because it was obeying this order, if the stockyards was bound by this order. That would be a collateral attack upon the order, which would not be permitted.

When I filed the complaint with the Commission, I made the stockyards a party defendant, and designed it under the provisions of the Elkins Act, to which your Honors have called attention this morning.

205 I see no reason to believe that that section of the Elkins Act does not mean literally what it says, and I believe the decisions under it sustain that position. They have not been many, but the earliest I could find was United States against Milwaukee Refrigerator Transit Company, 145 Fed. 107, in which the Transit Company, apparently a car company furnishing cars and not a common carrier by railroad, was giving some kind of a rebate. The Court issued a decree restraining that company, not a common carrier by railroad, from continuing that practice of rebates.

The Elkins Act refers not only to a decree of a Court, but to orders of the Commission in any proceeding before it. I could see no reason why, if the proceeding had happened to be before the Commission, it could not have entered an order that would have been the exact equivalent of the decree ordered by the Court in this case.

I will not stop to try your patience with all of the cases cited in my brief but it seems to me another one very much in point is Spencer Kellogg vs. United States, 20 Fed. (2d) 459. Certiorari was denied in that case. Here was the situation: It was alleged—and I assume proved—that Spencer Kellogg, which operated grain elevators in Buffalo, received an elevation allowance of one cent per bushel from the railroads which took the grain out of the elevators at Buffalo and carried it to the East. That was
206 given to Spencer Kellogg—and properly—for its service in elevating grain and holding it for the railroads. According to the decision, Spencer Kellogg tried to get more business for its elevator. It divided that one-cent allowance with shippers in the West, and advertised that if shippers would send their grain through that elevator, they would let them have one-half cent a bushel. That case was an indictment and the indictment was held good.

Spencer Kellogg, in that case, was not a common carrier by railroad, and that case, I think, is illuminating because, as the decision indicates, it all turns upon whether, under the Elkins Act, Spencer Kellogg could be held responsible for a violation of a provision of the Interstate Commerce Act, although it was not a common carrier by railroad, and although it was neither the shipper nor the receiver of the grain; but the Court held that it was guilty of a violation of the Act, and, as I say, certiorari was denied.

I come down to the last case on that subject, which is one that was mentioned by my friend, Mr. Farmer, but which I believe has been slightly misunderstood by him. That is the litigation that commenced in the Supreme Court, General American Tank Car Corporation against El Dorado Terminal Company, 308 U. S. 422. Here is what happened: The General American Tank Car Corporation, not a common carrier by railroad, engaged
207 solely in leasing tank cars—I think generally to shippers—had a contract with the El Dorado Company out in California, by which it charged that company a certain number of dollars per day or per month for the use of its cars, and agreed to give the company all the mileage that the tank-car company, not a common carrier by railroad, received from the railroads, for the use of the cars. As it turned out, over a period of time the mileage received by the tank-car company exceeded the rental paid by the El Dorado Company, and the tank-car company reached the con-

clusion that it was an unlawful arrangement for it to be giving that railroad money to the El Dorado Company. It refused to continue the payments of the excess over the rental, and it was sued by the El Dorado Company in the District Court in California.

When the case got to the Supreme Court, the Supreme Court held that it was a matter involving the primary jurisdiction of the Commission, and that when that stage had been reached in the litigation, the Court should have stayed its hand until there had been a finding by the Commission. It sent the case back, not to be dismissed, but simply to be held until the Commission should make its finding. The proceedings were then moved over to the Commission and the Commission did make its findings and allowances for privately owned tank cars—258 I. C. C. 371—in which it
208 held that it would be unlawful for the tank-car company to pay to the El Dorado Company a greater amount than the El Dorado Company paid to the tank-car company for the rental of the tanks. That was sustained in a very recent decision, in El Dorado Oil Works vs. United States. I haven't a United States citation yet. It is in the advance sheets, Volume 90, the Lawyer's Edition, No. 13, page 821.

There, plainly, was a case where the Commission made an order effective and for the purpose of carrying out the terms of the Interstate Commerce Act, which was operating solely against a person who plainly was not a common carrier by railroad, as defined in the Act. I believe that the action of the Commission in that connection was valid, and as it was sustained by the Supreme Court, it could only have been under these provisions of the Elkins Act.

It seems to me, therefore, as if the case almost depends in its entirety upon whether this order of the Commission is valid as applied to the stockyards company, and upon the record as made up to the time the case was submitted to the Commission for decision.

I thank your Honors.

Judge ALLEN. The Court will recess until 2 o'clock.

(Recess.)

Argument of Mr. Farmer

209 Mr. FARMER. If the Court please, just a few moments I should like to devote to answering some of the arguments that were made by the Interstate Commerce Commission and by the attorney for Swift & Company.

First of all, the attorney for Swift & Company waved the magic wand here in some unique method of trying to show that the stockyards company receives compensation. He pointed out a lot

of railroads over here [indicating] which he said the New York Central Railroad maintained for the benefit of the stockyard company.

Now, in point of fact, those tracks belong to the New York Central Railroad, so that there could be no compensation derived by the stockyard company for a track over in this section that belongs to the railroad company, itself, and they are maintaining their own tracks, obviously. I want to point out again that Swift & Company had its opportunity. This has been pointed out by Mr. Pierce very graphically; and much negotiations have gone on to make a direct connection with the main line of the New York Central down here [indicating] by use of 33rd Street, but it cost them some $13,000, as I remember the figure, and they didn't want to spend that. They would rather impose the obligation of furnishing a track facility upon the stockyards company, and not only have them pay for it—not only use their own land and track—but pass by the stockyards' bins upon which the
210 stockyards company gets an unloading charge, that was mentioned by the Commission.

It was pointed out by Swift & Company that the New York Central now bears the expense of unloading livestock at $1.25 a single deck, and $2.50 a double deck. I believe this Court knows that for small animals they have two decks, frequently, in stockyards. So, depending upon whether it is a two deck or a single deck, the Cleveland Union Stock Yards Company presently, for all this livestock shipped across here [indicating], enjoys for an unloading charge, $1.25.

It is true that the New York Central would avoid the payment of that unloading charge, being its obligation to unload, but nobody suggested—not even Swift & Company; nor does the Interstate Commerce Commission suggest—that every time a double-deck car passes on our track to Swift & Company, there goes $2.50, and every time a single deck passes, there goes $1.25, which the Interstate Commerce Commission ruthlessly orders us to pass up in order that Swift & Company may enjoy our track facilities. That is the real situation here.

Then they talk about the Elkins Act, Section 42 and Title 49. So far as I know, there has never been invoked that section of the Act against somebody outside of a common carrier that is an interested party, except in cases where a rebate is involved,
211 and Mr. Rynder pointed out to you in the Spencer Kellogg case that that was a rebate. Yes, and it was a criminal action, and that is how seriously Congress regards rebates or anybody who participates in a rebate. That is how seriously Congress regarded it. They enacted criminal statutes on it. These people

gave a rebate to the shipper and they got caught in the criminal statute. So far as I know, the only time that this Act was invoked is where some interested party had something to do with granting a rebate, or sharing in it, or connected with it.

Let's assume, just for the moment, that there is another case. I say to this Court that I verily believe—and I think that the decisions that I have quoted in this brief bear out the statement—that Congress could not delegate to the Interstate Commerce Commission the right to fix the compensation for a party outside of a common carrier. To do so would be confiscation. It would be appropriating property without due process of law, and I have cited a number of cases here to the effect that that is left to the Courts, and I should like to read just a moment from the case of Baltimore & Ohio Railroad Company vs. The United States. That involved some division of rates, and the Interstate Commerce Commission, as I recollect it now, gave a free use to some small railroads. But anyhow, it was a decision of rates which the Baltimore & Ohio and other carriers considered confiscatory, and here is what
212 the Supreme Court of the United States has to say on that subject: "There is a wide and fundamental difference between the question whether the Commission in prescribing the divisions found by it to be just, reasonable, and equitable, complied with the procedural requirements of the act." And then, further, "Congress is without power conclusively to bind the carriers." That is not a private person, but a carrier. "As the Congress itself could not be, so it cannot make its agents be." The Interstate Commerce Commission has been delegated its authority. It certainly does not stand beyond or above the Congress of the United States.

Speaking of the Constitutional question, I can't refrain from telling a little story about Mr. Paul Howland, who is known to all of you, who died some three years ago, one time a Congressman from one of the Cleveland districts, one time President of the Bar Association, and at all times a distinguished citizen and a gentleman. In any event, he attended a committee meeting of the United States Senate and they were all seated in this committee room at a big table, a number of the United States Senators, and there was a long table and Mr. Howland was sitting at the upper end. A Constitutional question came up that made it necessary to refer to the Constitution; so they had the clerks, and the secretary, and all the flunkies around the Senate looking for the Constitution,
213 and they couldn't find it. Mr. Howland sat back there, with some degree of contentment, and finally reached into his vest pocket and he pulled out a little memorandum book, such as you buy at the 5 & 10 cent store, and he slid it down the length

of this long table, and he said, "Gentlemen, there is the Constitution of the United States—what is left of it." They were very much tickled at that.

The point I was trying to make is that as far as the Commission is concerned, and as far as the attorneys representing the defendant here are concerned, they seem to think that the Constitution of the United States has simply passed out of existence. There is nothing that curbs their power, but that they can usurp at will the authority of the Court.

Judge ALLEN. Is that case cited in the brief, Mr. Farmer?

Mr. FARMER. Yes; it is, your Honor.

I would like to give you the case of the St. Joseph Stock Yards Company, 80 L. Ed. 1033, which develops at length the question of confiscatory acts.

Judge FREED. What page is that, Mr. Farmer?

Mr. FARMER. 80 L. Ed. 1033.

The Alton Railroad case, that Mr. Rynder, I think it was,
214 cited as being in point here, has nothing whatever to do with this case, because that was an instance in which the statute and the decisions of the Supreme Court of Illinois was concerned. and the case followed the Illinois decisions, as it usually does in a Constitutional question arising in the state.

Now, Nebraska had a law that railroad property—a railroad track—was a public highway, and the railroad company had permitted a couple of grain associations—associations of farmers—to build two grain elevators on the right-of-way. A third association endeavored to obtain a right to build, and the railroad would not permit it. They finally got into Court, and the question there was undue prejudice and discrimination. I shall not read all of that case, but this is what the Supreme Court of the United States said: "This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining an elevator upon it, was in essence and at best a taking of private property of the railroad for private use of the petitioners. The taking by a State of the private property of one person or a corporation without the owner's consent, for the private use of another, is not due
215 process of law and is in violation with the 14th Amendment of the Constitution." I think I am correctly stating it, that under the Constitution of the United States no private property can be taken for private use without the consent of the owner, and that under no circumstances may it be taken for public use without just compensation. Those are two requirements of the Constitution of the United States.

I believe that in this particular case the appropriation of the Cleveland Union Stock Yards property by order of the Interstate Commerce Commission takes property for the private use of Swift & Company.

The other packers there have raised no protest about this thing. They are satisfied with it. They are enjoying the movement of all classes of freight, by the consent of the stockyards company, on that property, except livestock, and I believe it is within the common, ordinary realm of business prudence for the stockyards to protect its business by not permitting them to use that track for delivery of livestock when, by the use of the stockyards track, they pass by the stockyards company and make a direct delivery.

It was pointed out what the stockyards would lose on unloading alone, to say nothing of the yardage charges and other services that are rendered on a shipment of livestock.

216 Now, argument down before the Commissioner has been introduced here and I am reading now from the stenographer's minutes before the Interstate Commerce Commission when this case was argued on October 3, 1945. Mr. Rynder, representing Swift & Company, on page 348, had this to say: "Now, you will notice this correspondence they have talked about"— that is, correspondence between the New York Central and Swift & Company—"and I think the railroad is the only person whom I have a remedy against here." It seems to me that when the attorneys for Swift & Company made that statement in the argument before the Interstate Commerce Commission, that it is somewhat significant, and it is somewhat on our side of this case.

Judge JONES. In passing, Mr. Farmer, I want one reaction from you on this question: when you open your tracks to the use of the carrier for the purpose of serving shippers or receivers of commodities transported by rail, can you put any limitation upon the parties or the character of the shipments for the benefit of which the track is used by the railroad in performing its common-carrier duty, so long as such service and use is practicable and can be made in safety?

Mr. FARMER. Yes, your Honor; I think we can. I think it is that Illinois case that I quoted. That is exactly what hap-

217 pened there. I believe the judiciary of the State of Illinois are very highly respected throughout the United States. The Supreme Court of Illinois said that it could be done. Now, it was done in our case.

Now, that leads me to this observation, that the Commission has twice—and Judge Freed asked a question on this—indicated in its opinion that this track may be withdrawn entirely from use. We should hate to do that. We don't want to do it, because they do have a large amount of shipment of other things, salt, hides,

processed meats; and so forth. The processed meats, of course, are beneficial to the stockyards because it means that they have bought at least some of those animals through the yards, and we are willing to let them do that, but I don't think that we can be compelled to let them have the track when it interferes with our business and takes revenue away from us.

Let's suppose that it is illegal. I don't concede that, because I think it is perfectly legal. But let's suppose they say, "You can withdraw it from use for all time." I say that it would be regretted because Swift & Company would lose much that they have out there in the way of transportation of other things—coal, for instance, which they use in their plant. But suppose we do. Then, it seems to me, that it is up to the stockyards company to exercise its right to cancel that contract, and that is all that they can do. They can't order us to go ahead with it.

218 I may say to the Court that we have done that. We have written to the New York Central Railroad, because we felt that that was the only thing we could do, and we have canceled that under the agreement, as it stands now, effective as of May 17, 1947, at midnight. The New York Central attached a copy of that letter to its petition, and I don't know that it is necessary to make a formal offer of our carbon copy which was receipted by the New York Central, or not. It is primary record, so if I may, by reference, introduce that letter canceling the contract, on this record, I do so now.

Judge ALLEN. Any objection?

Mr. REIDY. That is a letter after the proceedings closed? Yes; we do object to it, if your Honors please.

Judge ALLEN. The Court has announced the opinion that it is not admissible, Mr. Farmer, if it is something that occurred afterwards.

Mr. FARMER. Very well. Preserve the exception.

Continuing from this case [indicating]: "If, as to the value of its property, the owner accepts legislative or administrative determinations, or challenges them merely upon the ground that they were not made in accordance with the statute covering a subordinate agent, no Constitutional question arises, but when he appropriately invokes a just compensation clause, he is en-

219 titled to a judicial determination of the amount."

Judge ALLEN. Which is this?

Mr. FARMER. That is that Baltimore & Ohio case.

Judge ALLEN. That is cited in the brief?

Mr. FARMER. That is cited in the brief. It seems to me that in this whole thing the Commission has got the cart before the horse. Before they can tell the stockyards company that it must go ahead and furnish its sidetrack, there must be some provision made for

proper compensation. They have admitted here in argument that the stockyard company was entitled to compensation, but nothing said as to what it shall be, or nothing fixed. In any event, it hasn't been done, and we are ordered to furnish our track in order that Swift & Company may be serviced through the New York Central.

I say that the Commission has indicated its own weak position in this whole thing by saying that we can withdraw. I would like to read another citation.

Judge ALLEN. We are going to read your brief.

Mr. FARMER. I am not going to read any brief. I was just going to read that order, and I hope this Court will determine what it means, because I don't think anybody of ordinary intelligence, at least, can read it and understand just exactly what
220 the stockyards company is to do, or what is to become of the property. I thank you.

Argument of Mr. Pierce

Mr. PIERCE. If the Court please, I would like to reply to several remarks which have been made here, on behalf of the railroad plaintiffs in this action.

Mr. Rynder says that the order will not do any harm to the railroads. The order will do harm to the railroads. Five of these railroad plaintiffs have no connecting track of any kind with the Swift & Company, or the stockyards' facilities, yet they are ordered to provide a switch connection with Swift & Company's track. That is an impossibility for those five railroads. If we attempt to comply with it, I don't know how we could do it, or what we would do to comply with it.

We would first have to violate our contract with the stockyards company for the use of this sidetrack. The stockyards company is an industry on the New York Central Railroad, just the same as any other industry is. We have a sidetrack agreement with them. There are many of those sidetrack agreements in existence, as is shown in the record, which gives the railroad company a right to reach other industries by using that private industry's track.

They can go over it, but they must not interfere with the operations of the immediate or the initial industry. They can
221 use the track to a limited extent, and they can use it to reach other industries, and when that is done, it is customary—as the sidetrack agreements which are on record show—for the cost of maintenance of the track to be reduced on behalf of the initial industry, because they are not getting the entire use of it.

All of these sidetrack arrangements are subject to change and

subject to restrictions of various kinds. Before going into that, however, I would like to clear up one thing which Mr. Rynder mentioned about the stockyards being paid money for these other tracks over in here [indicating] by the railroads. That is true, but these other tracks referred to by Mr. Rynder, for instance, these tracks in here [indicating], are what they call loading and unloading tracks for livestock, which is unloaded into the stockyards unloading pens, or which are loaded from those pens. These tracks belong to the New York Central Railroad. They are laid on property of the stockyards, and the railroad company naturally maintains those tracks. The railroad company maintains this track that has been referred to, the 1,619 feet of track owned by the stockyards. They maintain it in return for the privilege of moving these shipments—what they call dead freight; not livestock—to these other industries, and all of these other industries have understood right along that there was a limited or restricted use on the stockyards track.

222 We have sidetrack agreements with all of those industries. None of them are complaining. Swift is the only complainant here, and Swift, if you please, is the shipper and also the consignee.

Swift ships livestock, for instance—taking the example in the record—from Indianapolis. Swift takes a carload of livestock that it owns there, and it consigns it to itself in Cleveland, and it directs the New York Central Railroad to take that car of livestock and move over the stockyard track—the track owned by the stockyards—over to Swift's plant. Swift directs that, knowing well that the New York Central can't move that stock over that track because the stockyards has prohibited it, and Swift knows that the stockyards wants a charge for the use of that track for livestock.

So, will the railroads be harmed here if there is any attempt made to comply with this order? How can the railroads comply with the order? Where can we give Swift & Company a track connection through the stockyards property? It is impossible for that to be done.

Something was said by Mr. Reidy about a full hearing before the Commission. We are not here complaining about a full hearing before the Commission. We are complaining about not

223 having full consideration given to the facts. We are complaining about the arbitrariness of the order, in ordering us to do the impossible thing; and of the inconsistency of the

order, in the first place: five railroads being ordered to provide a track connection, who are not able under any circumstances to do so.

Some mention was made here of the Alton Railroad case, and I would like to distinguish that, because that can easily be distinguished, as can all of the cases cited by the Interstate Commerce Commission, and the Attorney General here, and Swift & Company. There isn't any law that I know of that particularly is on all fours with the controversy before this Court. Some are close, but there are none where the industry itself is trying to say to another industry, "I have got to use your track to get out to the main line of the New York Central Railroad, because I don't want to build my own direct track connection." That is what is happening here.

In most of the other cases cited to you, with the exception, possibly, of the Sholl case—and in the Sholl case, there was a limitation upon a commodity there—the commodity was coal. There was a limitation, and the Court recognized it. The Court said the owner of the property had a right to protect itself against movements of competitive shipments of coal over that track. In the Sholl case, the railroad undertook to issue a tariff and to
224 move competitive coal over Sholl Brothers property. The Court said, "You can't do that, because you accepted the property to use it with that limitation," so that where the railroad attempted to do that, the Court said it couldn't be done.

If the railroad would attempt to do that here, the chances are that the Court would say it couldn't be done. "Where do you get your right to use stockyard property for moving this competitive or forbidden traffic?"

There has been something said here about Section 1 (9), and also about the Alton Railroad vs. Illinois Commerce Commission case. In that Alton case, there was a section of the Commerce Commission law of Illinois, which required a railroad company to do certain things in connection with putting in a side track. In that particular argument, the railroad company had agreed to be bound by the provisions of an ordinance to render service there, in that case. There was an argument between the industries and the railroad as to who was going to pay taxes and maintain the track, and the railroad went into receivership and the receiver claimed that it wasn't part of their transportation obligation. But the Court said, "You agreed in a contract to do it." So in the Alton case, it has no application, as I see it, to the argument here.

Now, under the provisions of Section 1 (9), I don't think
225 there is any great mystery about the application of Section 1 (9) by the Interstate Commerce Commission. That Commission is given broad powers, but there are good reasons why it is not given powers to appropriate property in any State. There are good reasons for that. Section 1 (9) has been discussed here under the Interstate Commerce Commission's and the Attorney General's brief, and on page 44 is cited this 275 U. S. 404 case, and in that case, although it isn't quoted, it says, "The railroad cannot be ordered to build the switch until after the shipper has built the private siding." So there is no question about that.

Also, in Luton Mining Company vs. Louisville & Nashville Railroad Company, cited at page 50 in the Commission's and Attorney General's brief, the Court held: "It is apparent from a reading of this section of the statute that no duty is imposed upon the railroad beyond its own right-of-way." Very true, that is a State court case, but there are numerous other cases like that, that hold that, and this is the first case, to my knowledge where the Commission has said that its order should be enforced, compelling the railroad to go off of its right-of-way, to go over onto the other property owner's property, and provide a connection for a shipper.

Instead of depriving Swift of anything in the use of this track
226 over here, it seems to me that the New York Central Railroad didn't deprive anyone of a public service. Rather, what we did was to begin the service for them, whatever the stockyards would permit to be moved over that track. The New York Central has taken no arbitrary action here. The New York Central took action only when the stockyards said that this business—the volume of it—was getting to be so great that "it affects our revenues, and if you move that over there, we want to be paid for it, and that charge is not in your line haul charge."

Frankly, we think the Swift request is unreasonable. We find nothing in the statute which says that an unreasonable request of a shipper must be granted. There isn't any other shipper that is asking us to go over on another property owner's property and build a track with them, and provide a connection.

Swift & Company have the advantage of Section 1 (9), just the same as the Long Dressed Beef, the Ohio Provision, and the Lake Erie Provision Company tracks are now connected to our main line, if Swift & Company would build its track up to our right-of-way line.

If any of the other three industries mentioned, which have direct track connections, should have any trouble with their service, they could enforce their rights under Section 1 (9) of the Act, because the railroad is required to render a service to operate over that connection. They have complied with the Act,
227 and they are in position to compel the railroad to perform the service and give them transportation over their tracks, because they are built up to our right-of-way.

In this case, Swift provided the right-of-way down here and they provided it because they didn't want to go up to the north end of West 63rd Street, which, by the way, doesn't show on this map, but it does show on Exhibit 13 very clearly. They didn't want to go up there and spend the money to build their own track connection.

When I handed the Court this Exhibit 11, I expected to call attention to Exhibit B, which is a letter dated July 30, 1939, written by Swift & Company to the New York Central, as follows: "Replying to your letter of the 29th, our statement was that we thought the packers would contribute $5,000 toward the damages account of building the Prim Street track"—that is, in order to get the connection up there [indicating] "and that if the others would give $3,000 or more, the Peoples Packing Company would give enough to make up the $5,000, but not to exceed $2,000." Swift was not willing to give more than $2,000 to get in a permanent track connection. The letter says, "but not to exceed $2,000 in any case, provided the track was built without further delay and without waiting for the lawsuits to be settled. This confirms what I have told you before, and please say if it is
228 satisfactory and if you will proceed on these lines."

Judge ALLEN. Your time is consumed, Mr. Pierce. Just state your last point, whatever it is.

Mr. PIERCE. I just want to say this, if the Court please, that the railroad is required here to do something that it cannot fulfill. The Commission doesn't tell us how it can be done. It simply says, "Go do it."

Submission of case

Judge ALLEN. The Court will take under advisement the motion to strike, which has been filed here, and the case is submitted.

229 In The District Court of The United States For The Northern District of Ohio, Eastern Division

Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before ALLEN, Circuit Judge, and JONES and FREED, District Judges

Opinion

Filed March 11, 1947

JONES, District Judge.

These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances, and in each case the same order of the Commission is challenged and sought to be enjoined. The plaintiffs in both cases were parties to the proceedings before the Commission and it was against both of them that the Commission issued its single order now under consideration.

The facts are not in dispute and are fully set forth in the Commission's opinion and in the several briefs of the parties.

For the purpose of decision the facts briefly may be summarized:

The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stockyards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stockyards have been posted as a stockyard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars.

230 In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company

(then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost, for business other than that of the Stock Yards Company, provided such use did not interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad for operation over lands of the Stock Yards Company and over the same track 1619. A 30-day termination clause was inserted in this second agreement.

Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding (plaintiff's exhibit 11, with map and letters attached) this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use.

In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1,619 for competitive traffic, construed by the Railroad and Stock Yards to mean livestock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached between the Railroad Company and the Stock Yards Company, on November 12, 1938, the Railroad's switching charge was made inapplicable to livestock. For some time prior to that date, and ever since, the Railroad has refused to deliver any livestock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between the Railroad and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission.

231 We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of live-

stock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand.

We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority.

Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.

We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable
232 upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant.

Both Swift & Company and the Commission rely heavily upon Morgan Run Rwy. v. Public Utilities Commission, 98 O. S. 218; 120 N. E. 295, and Alton RR Co. v. Illinois Commission, 305 U. S. 543, 555. It is our opinion that neither of these cases furnish support for the order. The former we think not pertinent since it arises out of and depends upon the construction of State statutes.

Also, in that case there were the following facts which undoubtedly influenced decision: It was conceded that the controlling interest in the railway company and the coal company was owned by substantially the same persons, although in different proportions, and that the same person was president of both companies. In the latter case the owner of the land over which the shipments were required to be made apparently was not a party, nor did the owner present any objection to the use of the private property. This latter decision also was based upon the effect of a State statute. On page 555 of Alton RR Co. v. Illinois Commission, supra, the opinion makes it clear that the situation here readily may be distinguished. Contrary to the appellant in that case, the Railroad here is asserting that it would be a trespasser and without right to continue to use the track as required by the order. At the conclusion of the second paragraph on page 555, the Court cites Roberts v. Northern Pacific R. Co., 158 U. S. 1, at page 11; and Northern Pacific R. Co. v. Smith, 171 U. S. 260, at page 271. In these cases the land owner made no effort to assert ownership, nor did the owner make any objection or take any steps to establish private property rights until long after trespass had been accomplished.

Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

233 Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use.

It was urged in argument before us by counsel for the Commission that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system; and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in

contracting for its use. If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law.

We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully cannot be made short of condemnation and compensation.

The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company
234 is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

In the view we take of the case, the complainants each are entitled to the relief prayed for.

Treating the proceedings as one upon final hearing, enforcement of the order of the Commission will be permanently enjoined.

Findings and conclusions may be presented for adoption and a decree entered accordingly.

[File endorsement omitted.]

235 In the District Court of the United States

[Title omitted.]

Civil No. 24435

Civil No. 24479

Plaintiffs' suggested findings of fact and conclusions of law

Lodged March 31, 1947

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and sought to be enjoined in each case, were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission, in its Docket No. 28714, entitled Swift and Company vs. The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company and the Livestock Terminal Service Company.

Upon due consideration, the court adopts the Findings of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

236 I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the city of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th

Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards") owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right-of-way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private sidetracks located on its own land, among which is a private sidetrack, 1,619 feet in length, which extends in a general northerly and southerly direction parallelling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turn-out or lead (139 feet long) from New York Central main tracks located on New York Central right-of-way, and forms the connecting track between the northerly and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for sidetrack purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described
237 track No. 245, were built in 1910 at the request of and pursuant to arrangements made by Swift and Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift and Company's plant to enable delivery of shipments to Swift and Company's meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a noncarrier corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stockyards and a public market on its own lands in the City of Cleveland. Since 1921, its stockyards have been posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control, or lease any rolling stock, locomotives, or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift and Company's meat processing plant private side-

track and the sidetracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants wtih respect to carload shipments.

238 III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company), of New York Central to construct certain private sidetracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899 was cancelled and another private sidetrack agreement was executed by the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same 1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads was made inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift and Company's private sidetrack or any other industry reached by using Stock Yards' 1,619 feet of track.

239 IV

In a letter, dated August 14, 1941, Swift and Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift and Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift and Company, the latter, an Illinois Corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941,

filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the Elkins Act (Sec. 42, Title 49, U. S. C.) and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift and Company is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift and Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19) and 1 (20) of said Act; that Swift and Company is subjected to unjust discrimination by reason of said railroads denying to Swift and Company services which were rendered to three competitors of Swift and Company, in violation of Section 2, and Swift and Company and its traffic had been
240 subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) of said Act. In said complaint, Swift and Company sought the reestablishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be partly responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on May 3, 1946, found in favor of Swift and Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

"ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May A. D. 1946

No. 28714

SWIFT AND COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES), THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried
241 over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby notified and required to establish and put in force, on or before the 30th day of August 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

By request, the effective date of the foregoing order was postponed from time to time, and finally to the ------ day of June 1947.

VI

The record before the Commission shows conclusively that Swift and Company at all times had full knowledge of the Stock Yards continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift and Company earlier and successfully had negoti-
242 ated for its own private sidetrack to be connected directly with the New York Central's main track and right of way at the north end of West 63rd Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift and Company as too expensive and Swift and Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track, the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift and Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift and Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete
ownership or to restrict its use. There is no evidence
243 that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift and Company, except under the provisions of the side track agreement. The entrance upon the land of the Stock Yards and the use of its track were not by sufferance, but, from beginning to the end, under the

provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift and Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift and Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift and Company's three named competitors, i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right-of-way of the New York Central, and delivery to
244 each of said three named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift and Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on side tracks or private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order we make no finding with respect to this phase.

245 *Conclusions of law*

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually sub-

ordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate
246 Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

The Cleveland Union Stock Yards Company is not subject to regulation by the Interstate Commerce Commission under Section 1 of the Interstate Commerce Act. Because of other legal questions in this case, the Court does not consider it necessary to determine whether the Interstate Commerce Commission has jurisdiction over The Cleveland Union Stock Yards Company under the Elkins Act (Section 42, Title 49, U. S. C.).

V

The Cleveland Union Stock Yards Company is a noncarrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

247

VII

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift and Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufference but under the terms of a written contract, the provisions of which were well understood by Swift and Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent, and notorious control reserved
248 in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or com-

mon carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift and Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift and Company.

XI

To require the service sought by Swift and Company, not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift and Company, but would in effect prefer Swift and Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the
249 direct private sidetrack connections of Swift and Company's three named competitors and Swift and Company's own indirect private side track connection the Commission exceeded its powers and authority in undertaking to invoke in Swift and Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift and Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift and Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes every semblance of a basis for holding that there is any discrimination whatsoever against Swift and Company, or any undue and unreasonable prejudice and disadvantage to Swift and Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private side-

track, no legal basis exists for a finding of any violation of Section 1 (6) of the Act, nor can there be any harm to such a shipper under such circumstances with respect to contrary provisions in a tariff.

XIV

No provision is found in the term "railroad" contained in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track
250 and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and right of way of the Railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for further benefit of the shipper.

251

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in

fact available for use. Common carrier services over private sidings and private industrial tracks cannot be expected, and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift and Company and other packers and shippers located upon it.

It is so ordered, and counsel for plaintiffs will submit appropriate judgment in accordance herewith.

252 The foregoing findings of fact and conclusions of law are respectfully submitted.

The Baltimore and Ohio Railroad Company, by Dwight B. Buss; The Pennsylvania Railroad Company, by Geo. H. P. Lacey; The Erie Railroad Company, by Willis T. Pierson; The Wheeling and Lake Erie Railroad Company, by John A. Duncan, Perry L. Graham; The New York Central Railroad Company, by Leo P. Day, Robert R. Pierce; The Cleveland Union Stock Yards Company, by M. S. Farmer.

A copy of the above Findings of Fact and Conclusions of Law were this 31st day of March 1947, sent by U. S. Mail to the Attorney General of the United States of America, the Interstate Commerce Commission, the United States District Attorney, and Swift and Company.

ROBERT R. PIERCE,
U. S. Dist. Judge.

254 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Findings of fact, conclusions of law and decree suggested by defendants lodged April 14, 1947

The Court adopts the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stockyards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stockyards have been posted as a stockyard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars. (Opinion of Court, p. 2.)

255 2. In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company (then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost, for business other than that of the Stock Yards Company, provided such use did not interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad providing for the use and maintenance by the railroad of the same track 1619 and other tracks. A 30-day termination clause was inserted in this second agreement. (Opinion of Court, p. 2, with slight modification.)

3. Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track

and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use. (Opinion of Court, pp. 2-3.)

4. In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1619 for competitive traffic, construed by the Railroad and Stock Yards
256 to mean livestock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached between the Railroad Company and the Stock Yards Company, on November 12, 1938, the New York Central Railroad's switching charge from connecting lines was made inapplicable to livestock. For some time prior to that date, and ever since, the New York Central Railroad has refused to deliver any livestock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between all the Railroads serving Cleveland and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission. (Opinion of Court, p. 3, with slight modification.)

5. From 1910 to February 1, 1935, the railroads transported all classes of freight, including livestock to and from Swift's siding over Track 1619; from January 1, 1930, to February 1, 1935, 1,161 carloads of livestock were so transported. Since February 1, 1935, they have transported all freight other than livestock to and from such siding over said tracks. The 1,619 feet of track owned by the Stock Yards Company, but maintained and operated by the railroad, is a portion of the only rail connection between seven industries and the railroads serving Cleveland. The carriers also transport carload shipments of livestock to the private sidetracks of Swift's competitors, The Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company whose tracks are adjacent to the stockyards but are served by the railroad without using tracks belonging to the Stock Yards. The service is performed by the carriers at the line-haul rates to Cleveland. These three plants are all located in the same general section of the New York Central's Cleveland yard as that in which Swift's plant is located. (Rept. of Interstate Commerce Commission, p. 59.)

257 6. It was necessary for Swift to take its livestock at certain hold pens in the Stock Yards short of its siding and drive its livestock across a street to its yards for slaughter. The parties were in dispute as to who should pay the charges for services performed beyond the unloading pens, assessed by the Stock Yards Company, and Swift filed the instant complaint, alleging

that the refusal of the railroads to deliver traffic at its siding, violated various sections of the act. (Rept. of I. C. C., p. 65.)

7. By this complaint, it was alleged that the refusal and failure of the railroad defendants named in the complaint to deliver interstate carload shipments of livestock to Swift's sidetrack facilities at its packing plant in Cleveland have subjected and will subject it to charges for the transportation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of Swift's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) a, (5), (18), (19), (20), and of section 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act were alleged. In its briefs before the Commission, Swift urged that the evidence also establishes violations of section 1 (4), (6) and (9) of Part I of the Act. (Rept. of I. C. C., pp. 55–56.)

8. Swift & Company sought the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroads' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. (Rept. of I. C. C. p. 56.)

258 9. Following the filing of this complaint, full proceedings were had before the Commission, following which the Commission issued its report of May 3, 1946. (Undisputed.)

10. Following the issuance of this report of May 3, 1946, petitions for reconsideration were filed by the railroad defendants, plaintiffs here, and by the Cleveland Union Stock Yards Company, also a plaintiff, to which replies were filed by Swift & Company, all as contained in the Commission's record. These petitions for reconsideration were denied by the entire Commission on October 7, 1946, whereupon these two suits were brought.

11. The facts are not in dispute and are fully set forth in the Commission's opinion. (Court's Opinion, p. 1.)

12. In No. 24435, the plaintiffs are The Baltimore & Ohio Railroad Company, The Pennsylvania Railroad Company, Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The New York Central Railroad Company.

The plaintiff in No. 24479 is The Cleveland Union Stock Yards Company, which was a defendant in the proceedings before the Commission and is one of the defendants against whom the Commission's order runs.

Swift & Company, the complainant before the Commission, has

intervened as a party defendant in these court proceedings under the provisions of Title 28, U. S. C. A., Sec. 45 (a). (Undisputed.)

13. Jurisdiction of this court is established by the provisions contained in 28 U. S. C. A. sections 41 (28), 43–48, and 49 U. S. C. A., Section 17 (9). (Undisputed.)

14. These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances and in each case the same order of the Commission is challenged and sought to be enjoined. (Undisputed.)

259 15. The proceeding was orally argued before a three-judge court, convened pursuant to statute, on February 25, 1947, and has been submitted to the court on briefs and oral argument. The entire record before the Commission was introduced in court at that time. (Undisputed.)

Based upon the foregoing findings of fact, the court enters the following

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject-matter of this suit. (Undisputed.)

2. We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record, and will consider only the complaint of the Stock Yards Company that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law. (Court's Opinion, p. 3.)

3. There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand, which we will not pass upon. (Court's Opinion, p. 4.)

4. We think the Commission's finding that track 1619 for a number of years has been devoted to public use does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. (Court's Opinion, p. 4.)

260 5. Upon these facts and upon the record there has been no such devotion of Track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway

or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant. (Court's Opinion, pp. 4–5.)

6. The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad. (Court's Opinion, p. 6.)

7. Concerning the argument that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system, and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in contracting for its use, we hold that if the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. (Court's Opinion, pp. 6–7.)

8. Jurisdiction over the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot lawfully order the Railroad to do what by law is forbidden
261 by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks. (Court's Opinion, p. 7.)

9. The complainants each are entitled to the relief prayed for, and treating the proceedings as one upon final hearing, enforcement of the order of the Commission of May 3, 1946, will be permanently enjoined, and a final decree to that effect entered. (Court's Opinion, p. 8.)

_____,
United States Circuit Judge.

_____,
United States District Judge.

_____,
United States District Judge.

262 In The District Court of The United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Final Decree

Filed April —, 1947

These causes being consolidated and coming on to be heard before the undersigned, constituting a Court of three judges, convened pursuant to statute (28 U. S. C. A. 47), upon application of the plaintiffs for a final injunction enjoining enforcement and annulling an order of the Interstate Commerce Commission, and final hearing having been held, the evidence and argument of counsel received and considered, and the causes submitted for final decree, and the Court having made its findings of fact and conclusions of law; it is

Considered, ordered, adjudged, and decreed that the application of plaintiffs for an injunction restraining the
263 enforcement of and annulling the order of the Interstate Commerce Commission be and it hereby is granted, and defendants, United States of America, the Interstate Commerce Commission, and Swift & Company, their agents, marshals, police, servants, attorneys, and each of them be and they hereby are perpetually enjoined and restrained from enforcing a certain order of the Interstate Commerce Commission made and entered by said Commission in its Docket No. 28714, in a proceeding entitled Swift & Company v. Baltimore & Ohio Railroad Co., et al., 266 I. C. C. 55, dated May 3, 1946, as from time to time amended by extending the effective date of said order.

------ ------,
United States Circuit Judge.

------ ------,
United States District Judge.

------ ------,
United States District Judge.

264 INTERSTATE COMMERCE COMMISSION

Office of the Chief Counsel

WASHINGTON, D. C.

APRIL 11, 1947.

Re: The Baltimore & Ohio R. R. Co., et al. v. United States, et al., Civil No. 24435; Cleveland Union Stock Yards Co. v. U. S., et al., Civil 24479

Honorable DON C. MILLER,
United States Attorney,
Federal Bldg., Cleveland, Ohio.

DEAR MR. MILLER: I enclose herewith six copies of suggested Findings of Fact, Conclusions of Law, and Final Decree for presentation to the Court, Circuit Judge Allen and District Judges Jones and Freed. These findings and conclusions were prepared after consultation between Messrs. Rynder and Staley, Attorneys for Swift & Company, and myself, and represent our joint views. Mr. Edward J. Hickey, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., has not had an opportunity to examine these findings, but will let you know prior to April 21, 1947, which is the time within which they have to be filed, if he has any additional suggestions.

We believe that the findings are more in conformity with the decision of the court than are the findings and conclusions submitted by counsel for plaintiffs with his letter of March 31, 1947. You will observe that at the end of each paragraph of the findings we have inserted in parentheses the basis for the statements contained therein. If the court is considering the adoption of the findings and conclusions submitted by plaintiffs, we have the following suggestions to make:

1. Page 2, Section I, the sentence commencing "the Stock Yards owns certain private sidetracks located on its own land." It is our understanding that the revised sidetrack agreement of June 16, 1924 (exhibit 9 in the Commission record) indicates that the railroad had taken over the private sidetrack in the stockyards, with the exception of track 1619. This same comment would also apply to the statement in section II, page 3, reading "it owns no railroad tracks, other than private switch tracks located on its own land."

265 2. In the second paragraph of section III, page 4, reference is made to the contract of June 16, 1924. We think there should be included substantially what we have stated above—that the railroad took over the ownership and maintenance of practically all the former private sidetracks of the stockyards and took over the maintenance of track 1619.

3. Further down in the second paragraph of section III, page 4, is a statement that "the switching charge theretofore published in tariffs of plaintiff railroads was made inapplicable to livestock," etc. The Commission found and it is a fact that the New York Central never changed its tariff providing for delivery of livestock reaching Cleveland via the New York Central.

4. In the last sentence on page 8, section VII, it is stated "there is no evidence that Stock Yards has ever acquiesced in any use of its land or said track," etc. One error is that the track was

never used by Swift & Company. Another is that since 1910 the railroad tariffs provided for delivery of all freight over track 1619, including livestock, and since 1938 the New York Central tariff has continued to authorize delivery of livestock over this track. It seems to us that the stockyards must have been upon notice concerning the provisions of these tariffs.

It seems to us that the second full paragraph, section VII, page 9, is a conclusion of law rather than a finding of fact.

5. In section VIII of the conclusions of law, page 13, reference is made to the use of the land by Swift & Company. We again call attention to the fact that Swift & Company has never used the land or track.

6. Section X, page 14, the 5th line reads "livestock to Swift and Company." If this conclusion remains in practically its present form, we think the last line should be changed to read "livestock by New York Central to Swift & Company."

We believe that Conclusions of Law XII to XVI, inclusive, suggested by plaintiffs, at any rate, be stricken. A reading of the Court's opinion shows that it disposed of the case on only one ground and did not consider other contentions; however, these conclusions XII to XVI, inclusive, purport to dispose of the case on grounds not covered in the Court's opinion.

A copy of these suggested findings, conclusions, and final decree are being transmitted to all counsel.

Very respectfully,

(S) E. M. Reidy,
E. M. Reidy,
Assistant Chief Counsel.

cc: R. D. Rynder.
Edward J. Hickey, Jr.
R. R. Pierce.
D. B. Buss.
George H. P. Lacey.
Willis T. Pierson.
John H. Duncan.
Leo P. Day.
M. S. Farmer.

266 In The District Court of The United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Memorandum of objections and exceptions to the proposed findings and conclusions of the United States of America, Interstate Commerce Commission and intervener, Swift & Company.

Filed April 30, 1947

Inasmuch as the United States District Attorney was asked to call to the attention of the Court certain observations of counsel for the defendants with respect to several phases of the Findings and Conclusions of plaintiffs, the plaintiffs herewith submit their objections and exceptions with respect to the Findings and Conclusions submitted by Defendants.

Findings of Facts offered by Defendants will be discussed seriatim.

I

Finding No. 2: Beginning in the fourth line from the end, the words "providing for the use and maintenance by the Railroad of the same track 1619 and other tracks" appear and should be deleted. Defendants' counsel have substituted this language instead of the language used by the Court on Page 2 of its
267 decision, wherein the Court said that the June 1924, side-track agreement provided "for operation over lands of the Stock Yards Company and over the same track 1619" which the Court found to be an important element in determining this case and which pronouncement of the Court should be used.

II

If Finding No. 4, page 3 of Defendants' Findings is adopted, the full paragraph without any modification of the Court's phraseology should be incorporated, and then the second paragraph on page 5 of this Court's decision, reading as follows:

"Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiesence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use"

should be included as the second paragraph of Finding No. 4 because said above quoted pronouncement by the Court is a pivotal finding having an important bearing upon the determination of this case.

III

(a) Finding No. 5, page 3, contains a (third) sentence reading as follows:

"The 1,619 feet of track owned by the Stock Yards Company, but maintained and operated by the railroad, is a portion of the only rail connection between seven industries and the railroads serving Cleveland"

and reference is made to page 59 of the Report of the ICC.

We have searched in vain, on page 59 and through the entire Report of the Commission, but no such phraseology is found.

268 This statement is misleading and open to misconstruction inasmuch as the other six industries referred to are not in a position similar to that of Swift and Company. None of those industries has traffic competitive with the Stock Yards; each has its own separate sidetrack agreement, and none of the industries reached over said 1,619 feet of track, excepting Swift and Company, is affected in any way by the controversy, nor are such other industries contending for any arrangement contrary to the provisions of their sidetrack agreements.

Hence, if it be deemed necessary that this sentence be adopted, we suggest that in the interest of accuracy the words "seven industries" be deleted and the words "complainant's plant" be inserted.

(b) Also, the last three lines on page 3 contain reference to Swift's so-called three-competitor companies being "located in the same general section of the New York Central's Cleveland yard as that in which Swift's plant is located." This is an erroneous statement. Said so-called competitors' plants are located in the same section of Cleveland and said three competitors have their own private sidetracks connected with the main tracks of the New York Central, but neither these industries nor Swift and Company are located in any railroad yard of the New York Central. Notwithstanding the statement made by the Commission in this respect, there is no testimony to this effect.

IV

Finding No. 6, page 4: We have searched page 65 of the Report of the ICC, referred to by counsel for defendants as the

269 basis for this finding, and elsewhere in the Commission's report and this Court's decision, but are unable to find cor-

roboration for such a finding. Finding No. 6 should, therefore, be deleted in its entirety.

V

Finding No. 10, page 5 is superfluous and has no place in the Findings of Fact or Conclusions of Law and the Court did not mention it. If Finding No. 10 is adopted then the fact should be shown that two proposed reports were made by three ICC Examiners in each of which the recommendation was made that Swift's complaint should be dismissed.

CONCLUSIONS OF LAW

I

Conclusion 2, page 6, as suggested by defendants, does not conform to the Court's decision with respect to important phases of the controversy. It places the Court in the position of considering "only the complaint of the Stock Yards Company" and omits any reference to the predicament in which the plaintiff Railroads find themselves, notwithstanding the fact that the Court's decision immediately following the word "record" in the fourth line of Conclusion 2 sets forth an important phase of the railroads' position.

If this Conclusion of Law is to be adopted by the Court we suggest that the entire first full paragraph on page 3 of the Court's decision be adopted. It reads as follows:

"We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order
270 upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law" for the reason that the full consideration given by the Court to these phases is necessary in order to show the basis of the Court's decision and would be exceedingly important for a complete understanding.

II

Conclusion 3, page 6: The last six words of this paragraph "which we will not pass upon" are not stated at any point in the Court's decision. If this Conclusion of Law is to be adopted, then the six words should be deleted.

III

If conclusion 4, page 6, is to be adopted, we suggest that in order to embrace the full decision of the Court, there should be included as the first paragraph of Conclusion 4 the observations made by the Court in the next to the last paragraph on page 3 reading as follows: "We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order." And also, certainly there should be inserted the next paragraph in the decision of the Court, beginning on page 3, reading as follows:

271 "Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use."

IV

Conclusion 5, page 7: Plaintiffs concede that this is a correct conclusion and should be adopted; however, this conclusion would be incomplete without adding the highly significant and essential element in the Court's decision appearing in the last full paragraph on page 6, reading as follows:

"The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier."

This conclusion is exceedingly important to the determination made by the Court and goes to the very fundamentals of the controversy. Counsel for defendants have failed to make any reference whatsoever to this profound conclusion of the Court.

V

If conclusion 7, page 7 is to be adopted we suggest that in order to show the full decision of the Court with respect to this phase the defendants' suggested conclusion should continue with the remaining two sentences in the same paragraph on page 6 of the Court's decision from which defendants'
272 *Conclusions of Law* have been extracted, said sentences reading as follows:

"If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law."

VI

If conclusion 8, pages 7 and 8, is to be adopted, there should be added immediately after the sentence ending with the word "System," in the third line from top of page 8, the following: "Such transfer of property lawfully can not be made short of condemnation and compensation," which pronouncement of the Court appears immediately following the word "System" in the eighth line of first full paragraph in page 6 of the Court's decision.

Counsel for defendants have omitted any reference whatsoever to this essential element in the Court's decision.

Respectfully submitted.

Dwight B. Buss,
DWIGHT B. BUSS,
Andrew P. Martin,
ANDREW P. MARTIN,
Geo. H. P. Lacey,
GEO. H. P. LACEY,
Willis T. Pierson,
WILLIS T. PIERSON,
Perry L. Graham,
PERRY L. GRAHAM,
John A. Duncan,
JOHN A. DUNCAN,
Robert R. Pierce,
ROBERT R. PIERCE,
Leo. P. Day,
LEO P. DAY,
M. S. Farmer,
M. S. FARMER,
Attorneys for Plaintiffs.

A copy of the above Objections and Exceptions were this 30th day of April 1947, sent by U. S. Mail to the Attorney General of the United States of America, the Interstate Commerce Commission, the United States District Attorney, and Swift and Company.

Robert R. Pierce.
ROBERT R. PIERCE.

273 ORDER AND JUDGMENT

These two causes having been duly and properly submitted to this legally convened statutory three-judge court upon plaintiffs' motion for a preliminary injunction and complaint praying for a temporary and permanent injunction of enforcement of and to vacate, set aside, suspend, and annul the order of the Interstate Commerce Commission, entered May 3, 1946, in the proceeding entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., Docket No. 28714, and Answers of the defendants herein, United States of America and the Interstate Commerce Commission, and intervener Swift and Company, praying that the within complaint be dismissed, and the cause having been taken under advisement by the court, and now the court being fully advised in the premises and having filed and entered of record its opinion, findings of fact, and formal conclusions of law, separately stated,

It is ordered, adjudged and decreed, that a permanent injunction be and hereby is granted, permanently enjoining the enforcement of said Order of the Interstate Commerce Commission hereinabove described and that said order be and hereby is vacated, set aside and annulled.

_____,
United States Circuit Judge.

_____,
United States District Judge.

_____,
United States District Judge.

274 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Titles omitted.]

Findings of fact and conclusions of law

Filed May 9, 1947

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and

sought to be enjoined in each case were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission in its Docket No. 28714, entitled Swift & Company vs., The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and the Livestock Terminal Service Company.

Upon due consideration, the court adopts the Findings
275 of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the City of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards") owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right-of-way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private side tracks located on its own land, among which is a private side track, 1,619 feet in length, which extends in a general northerly and southerly direction paralleling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turn-out or lead (132 feet long) from New York Central main tracks located on New York Central right-of-way, and forms the connecting track between the northerly and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for side track purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described track No. 245, were built in 1910 at the

request of and pursuant to arrangements made by Swift & Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift and Company's plant to enable delivery of shipments to Swift & Company's
276 meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a noncarrier corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stockyards and a public market on its own lands in the City of Cleveland. Since 1921, its stockyards have been posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control, or lease any rolling stock, locomotives, or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift & Company's meat processing plant private sidetrack and the sidetracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants with respect to carload shipments.

III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company), of New York Central to construct certain private sidetracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899, was cancelled and another private sidetrack agreement was executed by
277 the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same

1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads for that reason became inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift & Company's private sidetrack or any other industry reached by using Stock Yards' 1,619 feet of track.

IV

In a letter, dated August 14, 1941, Swift & Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift & Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift & Company, the latter, an Illinois corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941, filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the Elkins Act (Section 42, Title 49, U. S. C.)
278 and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift & Company is deprived of lawful transportation to which it is entitled in violations of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift & Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19), and 1 (20) of said Act; that Swift & Company is subjected to unjust discrimination by reason of said railroads denying to Swift & Company services which were ren-

dered to three competitors of Swift & Company, in violation of Section 2, and Swift & Company and its traffic had been subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) of said Act. In said complaint, Swift & Company sought the reestablishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line-haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be partly responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1,619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on March 3, 1946, found in favor of Swift & Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

"ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May, A. D. 1946

No. 28714

SWIFT AND COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES), THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and
279 answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the

Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby, notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*"

By request, the effective date of the foregoing order was postponed from time to time, and finally to the — day of June 1947.

VI

The record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift & Company earlier and successfully had negotiated for its own private sidetrack to be connected directly with the New York Central's main track and right of way at the north
280 end of West 63rd Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift & Company as too expensive and Swift & Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track, the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift & Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete ownership or to restrict its use. There is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the sidetrack agreement. The entrance upon the land of the Stock Yards and the use of its track were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift & Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of
281 the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift & Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift & Company's three-named competitors; i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right-of-way of the New York Central, and delivery to each of said three-named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with

respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on sidetracks of private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order, we make no finding with respect to this phase.

282 CONCLUSIONS OF LAW

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

For the purpose of this case the Court assumes, without deciding, that under the Elkins Act, Section 42, Title 49 U. S. C., the Interstate Commerce Commission has jurisdiction over the Stock Yards Company, since it has been made a party in the case, and has the power to enter a lawful order affecting the Stock Yards Company in respect of matters in which the
283 Commission has authority.

V

The Cleveland Union Stock Yards Company is a noncarrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

VII

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far

from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period
284 it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent, and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway of common carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

XI

To require the service sought by Swift & Company, not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three
285 named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Com-

pany's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and unreasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

XIV

No provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and
286 right-of-way of the Railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service

in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union
287 Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift & Company and other packers and shippers located upon it.

Counsel for plaintiffs will submit order for appropriate judgment in accordance herewith.

(S) FLORENCE E. ALLEN,
Circuit Judge.

(S) PAUL JONES,
District Judge.

(S) E. B. FREED,
District Judge.

MAY —, 1947.

288 In the District Court of the United States for the Northern District of Ohio, Eastern Division

Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Order and judgment

Filed May 14, 1947

These two causes having been duly and properly submitted to this legally convened statutory three-judge court upon plaintiffs' motion for a preliminary injunction and complaint praying for a temporary and permanent injunction of enforcement of and to vacate, set aside, suspend, and annul the order of the Interstate Commerce Commission, entered May 3, 1946, in the proceeding entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., Docket No. 28714, and Answers of the defendants herein, United States of America and the Interstate Commerce Commission, and intervener Swift and Company, praying that the within complaint be dismissed, and the cause having been taken under advisement by the court, and now the court being fully advised in the premises and having filed and entered of record its opinion, findings of fact, and formal conclusions of law, separately stated,

It is ordered, adjudged, and decreed, that a permanent injunction be and hereby is granted, permanently enjoining the enforcement of said Order of the Interstate Commerce Commission here-

inabove described and that said order be and hereby is vacated, set aside, and annulled.

(S) FLORENCE E. ALLEN,
United States Circuit Judge.
(S) PAUL JONES,
United States District Judge.
(S) E. B. FREED,
United States District Judge.

Approved as to form only:

F. KAVANAGH,
Asst. U. S. Attorney.

289 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Petition for appeal

The United States of America, the Interstate Commerce Commission, and Swift & Company, defendants in the above-entitled causes, feeling themselves aggrieved by the final decree of the United States District Court for the Northern District of Ohio, Eastern Division, entered in said court on May 14, 1947, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

290 Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated July 11, 1947.

/S/ George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

/S/ John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

/S/ Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For the United States of America.

/S/ Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

/S/ Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

/S/ Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

291 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Order allowing appeal

In the above-entitled causes, the United States of America, the Interstate Commerce Commission, and Swift & Company, defendants therein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered May 14, 1947, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided:

It is ordered and decreed, that the appeal be, and the same is hereby allowed as prayed for.

Dated July 11, 1947.

By PAUL JONES,
United States District Judge.

292 [Citation in usual form, filed July 11, 1947, omitted in printing.]

293 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Notice of appeal

To the Attorney General for the State of Ohio:

You are hereby notified that the District Court of the United States for the Northern District of Ohio, Eastern Division, on

July 11, 1947, filed and entered an order allowing an appeal by the United States and the Interstate Commerce Commission to the Supreme Court of the United States from a decree filed and entered on May 14, 1947, in the above-entitled case, and that the citation signed by such court on June 1947, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents:

294 1. The citation referred to above.

2. Petition for and order allowing said appeal.

3. Defendants' jurisdictional statement and assignment of errors pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States.

4. Statement required to be served upon appellee by said Rule 12.

This notice is given you pursuant to the provisions of U. S. Code, Title 28, Sec. 27a, enacted March 3, 1911, c. 231, Sec. 210.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

(S) Edward J. Hickey,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

295 CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing notice, together with attachments as therein listed, by this day mailing a copy of

the same to the Attorney General for the State of Ohio at the State House, Columbus, Ohio.

(S) Gordon C. Locke,
GORDON C. LOCKE,
Attorney for Interstate Commerce Commission.

296 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Assignment of errors

Now come the United States of America, the Interstate Commerce Commission, and Swift & Company, defendants in the above-entitled causes, and in connection with their appeal herein, file the following assignment of errors upon which they will rely in their prosecution of said appeal to the Supreme Court of the United States from the final decree of the District Court dated May 14, 1947. The District Court erred:

1. In failing to dismiss plaintiffs' suits and to deny the relief applied for by plaintiffs.

2. In failing to hold that the order of the Interstate Commerce Commission dated May 3, 1946, in a proceeding docketed as No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Co., et al., 266 I. C. C. 55, is in all respects valid and lawful.

297 3. In undertaking to substitute its judgment for that of the Interstate Commerce Commission with respect to transportation questions confided by law to the Interstate Commerce Commission.

4. In holding that the Commission's finding "that track 1619 for a number of years has been devoted to public use does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively."

5. In holding that "upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the

latter lawfully may move shipments of freight or livestock to the Swift & Company plant."

6. In holding that "the Stock Yards Company never had acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts."

7. In holding that: "Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track."

8. In failing to hold that the use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system, and that the Railroad cannot refuse to comply with the Commission's order.

298 9. In holding that "If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess."

10. In holding that the "order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law."

11. In holding that jurisdiction over "the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property."

12. In holding that the Commission cannot lawfully order the Railroad to comply with its order by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system; and in holding that such transfer of property lawfully cannot be made short of condemnation and compensation.

13. In holding that "The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier."

14. In holding that "To require the service sought by Swift & Company not only would amount to appropriation of the Stock

Yards Company's property for the use of Swift & Com-
299 pany, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

15. In holding that "the complainants each are entitled to the relief prayed for."

16. In holding that "enforcement of the order of the Commission will be permanently enjoined."

17. In finding as a fact that Track 1619 was a private side track.

18. In finding that the record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of Track 1619, and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

19. In finding as a fact that every shipper served or being served by the use of Track 1619 has had full knowledge of Stock Yards' ownership and control of said track.

20. In finding as a fact that there is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the side track agreement.

21. In finding as a fact that the finding of the Commission with respect to Stock Yards' Track 1619 for a number of years having been devoted to public use is without legal support in the record.

22. In substituting its judgment for that of the Commission, and in finding that the physical conditions existing with respect to reaching the plants of the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, are definitely different from the conditions attendant upon reaching Swift & Company's plant.

300 23. In concluding as a matter of law, that the Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law.

24. In concluding as a matter of law that the Interstate Commerce Commission cannct lawfully order the railroads to comply with the Commission's order by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system.

25. In concluding as a matter of law that jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under

the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

26. In concluding as a matter of law that whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

27. In concluding as a matter of law that The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system.

301 28. In concluding as a matter of law that the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts.

29. In concluding as a matter of law that although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property.

30. In concluding as a matter of law that the constant, consistent, and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

31. In concluding as a matter of law that the Commission erred in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

32. In concluding as a matter of law that to require the service sought by Swift & Company not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connection switches or sidetracks.

33. In concluding as a matter of law that in view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three-named competitors and Swift & Company's own indirect private sidetrack connection

the Commission exceeded its powers and authority in
302 undertaking to invoke in Swift & Company's behalf the powers of the Commision under the provision of Section 1 (9) of the Act.

34. In concluding as a matter of law that in view of the full knowledge by the complaining shipper of limitations placed upon the Railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

35. In concluding as a matter of law that no provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use.

36. In concluding as a matter of law that a railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use.

37. In concluding as a matter of law that the complainants herein are entitled to the relief prayed for.

38. In entering its final decree of May 14, 1947, setting aside and annulling the Commission's order of May 3, 1946.

Wherefore, Defendants pray that the said decree be reversed.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,

(S) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

305 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Order as to exhibits

Dated July 11, 1947

In accordance with the provisions of Section 47A of Title 28, U. S. Code, and with the provisions of defendants' praecipe for transcript of record on appeal of the above-entitled matter to the Supreme Court of the United States:

It is hereby ordered, that the documents and papers received in evidence in the District Court in the trial of this cause, and the stenographer's transcript of the proceedings held before the three-judge court on February 25, 1947, may all be forwarded, in lieu of copies of such documents and papers, to the Clerk of the Supreme Court of the United States as a part of the transcript of the record on appeal herein.

306 Dated this 11 day of July 1947.

[S] Paul Jones,
PAUL JONES,
United States District Judge.

Service of order as to exhibits is hereby acknowledged this 11 day of July 1947.

The Baltimore and Ohio Railroad Company, (S) Baker, Hosteller & Patterson, Baker, Hosteller and Patterson, by (S) Dwight B. Buss, Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, (S) Squire, Sanders & Dempsey, Squire, Sanders and Dempsey, by (S) George H. P. Lacey, George H. P. Lacey, Its Attys., 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, (S) Willis T. Pierson by P. H. Donovan, Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Co., (S) M. B. & H. H. Johnson, M. B. and H. H. Johnson, by (S) John A. Duncan, John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central

Railroad Company, by (S) Robert R. Pierce by A. C. Russell, Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio; The Cleveland Union Stock Yards Company, by (S) M. S. Farmer by E. J. Warrick, M. S. Farmer, Its Attorney, 802 Engineers Bldg., Cleveland 14, Ohio.

307 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Praecipe for transcript of record

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled consolidated causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Motion for preliminary injunction in Civil No. 24435.
2. Affidavit of R. R. Pierce in Civil No. 24435.
3. Complaint in Civil No. 24435 and Exhibits A–E, inclusive.
4. Answer of United States in Civil No. 24435.
5. Answer of Interstate Commerce Commission in Civil No. 24435.

308 6. Answer of Swift & Company in Civil No. 24435 and exhibit attached thereto.

7. Order of Court dated January 2, 1947, assembling a three-judge court.
8. Motion for preliminary injunction in Civil No. 24479.
9. Affidavit of M. S. Farmer in Civil No. 24479.
10. Complaint in Civil No. 24479.
11. Order of Court dated February 25, 1947, consolidating the two cases.
12. Answer of United States in Civil No. 24479.
13. Answer of Interstate Commerce Commission in Civil No. 24479.
14. Petition of Swift & Company for leave to intervene in Civil No. 24479.
15. Answer of Swift & Company in Civil No. 24479.
16. Minutes of hearing held before three-judge court at Cleveland, Ohio, on February 25, 1947, including record introduced at such hearing.

17. Record in Interstate Commerce Commission Docket No. 28714, including testimony and exhibits before Interstate Commerce Commission at hearing held on February 25, 1947, before three-judge court.

18. Two oral arguments before Interstate Commerce Commission received by three-judge court at hearing on February 25, 1947.

19. Petition of railroads for reconsideration filed with the Interstate Commerce Commission in Docket No. 28714, and reply of Swift & Co. to such petition, received in evidence by three-judge court on February 25, 1947.

20. Opinion of court, filed March 11, 1947.

21. Plaintiffs' suggested findings of fact and conclusions of law.

22. Findings of fact and conclusions of law suggested by defendants, United States, Interstate Commerce Commission and Swift & Company.

23. Letter of defendants to United States Attorney Miller dated April 11, 1947, transmitting defendants' suggested findings and conclusions and objecting to findings and conclusions suggested by plaintiffs.

309 24. Plaintiffs' memorandum of objections and exceptions to defendants' suggested findings and conclusions.

25. Findings of fact and conclusions of law entered by court on May 9, 1947.

26. Final order and judgment dated May 14, 1947.

27. Petition for appeal.

28. Order allowing appeal.

29. Citation on appeal.

30. Notice of appeal to plaintiffs.

31. Notice of appeal to Attorney General of Ohio.

32. Assignment of errors.

33. Statement by defendants-appellants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.

34. Order of District Judge as to exhibits.

35. This praecipe.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,

(S) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

310 Service of Praecipe is hereby acknowledged this 11 day of July 1947.

The Baltimore and Ohio Railroad Company, (S) Baker, Hosteller and Patterson, Baker, Hosteller and Patterson, by (S) Dwight B. Buss, Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, (S) Squire, Sanders & Dempsey, Squire, Sanders and Dempsey, by (S) George H. P. Lacey, George H. P. Lacey, Its Attys., 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, (S) Willis T. Pierson, by P. H. Donovan, Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Company, (S) M. B. & H. H. Johnson, M. B. and H. H. Johnson, by (S) John A. Duncan, John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by (S) Robert R. Pierce by A. C. Aussell, Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio; The Cleveland Union Stock Yards Company, by (S) M. S. Farmer by Elmer J. Warrick, M. S. Farmer, Its Attorney, 802 Engineers Bldg., Cleveland 14, Ohio.

311 [Clerk's certificate to foregoing transcript omitted in printing.]

314 Before the Interstate Commerce Commission
Docket No. 28714

SWIFT & COMPANY, COMPLAINANT

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., DEFENDANTS

Reporter's transcript of hearings

CLEVELAND HOTEL,
Cleveland, Ohio, Wednesday, April 22, 1942.

Met, pursuant to notice, at 2:00 p. m., E. W. T.

Before PAUL O. CARTER, Examiner.

Present: R. D. Rynder, 4115 Packers Ave., Chicago, Illinois, appearing for Swift & Company, Complainants. W. N. King, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. R. R. Pierce, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. D. P. Connell, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. John J. Fitzpatrick, 3006 Terminal Tower, Cleveland, Ohio, appearing for the N. Y. C. & St. L. Railroad Company, Defendant. Kemper A. Dob-
315 bins, 3013 Terminal Tower, Cleveland, Ohio, appearing for the N. Y. C. & St. L. Railroad, Defendant. A. Z. Baker, 3200 W. 65th St., Cleveland, Ohio, appearing for the Cleveland Provision Company, Defendant. C. B. Heinemann, 307 McLachlen Building, Washington, D. C., appearing for the Livestock Terminal Service Company, Defendant.

317 PROCEEDINGS

Exam. CARTER. Come to order, please, gentlemen.

The Interstate Commerce Commission has set at this time and place Docket No. 28714, Swift & Company, versus the Baltimore & Ohio Railroad Company, et al.

Who appears for the Complainant?

Mr. RYNDER. R. D. Rynder.

Exam. CARTER. Who appears for the Defendants?

Mr. KING. R. R. Pierce, John J. Fitzpatrick, D. P. Connell, W. N. King.

Mr. DOBBINS. And also Kemper A. Dobbins.

Mr. HEINEMANN. C. B. Heinemann, appearing for the Livestock Terminal Service Company.

Mr. BAKER. A. Z. Baker, appearing for the Cleveland Union Stock Yards Company.

Exam. Carter. With reference to free copies, Mr. Rynder, you are to receive a copy for the Complainant.

Mr. Rynder. I would like to.

Mr. Heinrmann. We will let the railroads have it.

Mr. King. I will take it.

Exam. Carter. No pleadings of intervention to be filed?

Mr. King. No.

Exam. Carter. The flyleaf of the docket contains this language: "It is alleged—" I didn't write this, so, I don't know whether it is correct— "It is alleged that the refusal of

318 Defendants to deliver carload shipments of livestock to complainant's sidetrack facilities at its plant in Cleveland, Ohio, has and will subject complainant to the payment of charges for the transportation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of competitors located at Cleveland, Ohio, and unjustly prejudicial to complainant, in violation of sections 1 (3), (5), (18), and (20), also in violation of sections 2 and 3 of the Interstate Commerce Act.

The Commission is asked to establish tariff provisions under which complainant may have transported to its plant at Cleveland, Ohio, in interstate commerce, carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates for such transportation and under which the defendants will restore to complainant's plant at Cleveland the service and deliveries in connection with carload shipments of livestock which were performed by said defendants prior to November 12, 1938, and to award reparation including shipments which may have moved during the pendency of this proceeding."

Is that in substance correct?

Mr. Rynder. I think that is correct in substance, Mr. Examiner. If in any respect it eliminates any allegation of the complaint, I assume that we can stand on the complaint.

Exam. Carter. Oh, yes.

319 Mr. Rynder. Mr. Examiner, before we call a witness, we have distributed certain exhibits, and perhaps it will be easier to refer to them if I have them marked for identification now.

The first one is a map, which will be marked Exhibit 1. The second one is a photostatic copy of the tariff of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; that has two sheets. The next one is a photostatic copy of the tariff of the New York Central Railroad Company, which will be marked Exhibit 3. The next one is a one-page copy of a letter addressed to Mr. C. J. Brister which will be marked Exhibit No. 4. The

next one is a copy of a letter addressed to Mr. W. A. Mayfield which will be marked for identification Exhibit 5. The next one is a copy of a bill of lading which will be marked Exhibit 6. The next one is a reproduction of Appendix I, II, and III of the Interstate Commerce Commission's decision in Ex Parte 127, and that will be Exhibit 7. The next one is a reproduction of Exhibit 312 filed in Ex Parte 127 which will be Exhibit 8.

(Complainant's Exhibits Nos. 1 to 8, Witness G. F. Tally, marked for identification.)

Mr. RYNDER. Now, I will call Mr. Tally.

G. F. TALLY was sworn and testified as follows:

Direct examination by Mr. RYNDER:

Q. Mr. Tally, state your name please.

320 A. G. F. Tally.

Q. Please state your residence and position.

A. I live in Chicago, Illinois, and I am assistant traffic manager of Swift & Company, Chicago, Illinois.

Q. Are you familiar with the operations conducted by Swift & Company at its Cleveland plant?

A. Yes, sir.

Q. Have you examined the property at and around that plant and the stockyards across the street, and so forth?

A. Yes, sir.

Q. Is Swift & Company a corporation?

A. Yes, sir.

Q. And where was it organized?

A. State of Illinois.

Q. In what business is it engaged?

A. In the packing-house business.

Q. Does it operate a plant at Cleveland, Ohio?

A. Yes, sir.

Q. In connection with the operation of this plant at Cleveland, Ohio, have you prepared an exhibit in the form of a map showing approximately the location of the plant, the streets, and various tracks?

A. Yes, sir.

Q. From what source did you obtain that map?

A. Well, it was taken from an exhibit filed by witness

321 E. J. Gibbons in I. C. C. Docket No. 28400.

Q. Exhibit 6?

A. Yes, sir.

Q. To your knowledge, does it represent with approximate correctness the locations indicated on it?

A. Yes, sir.

Q. Please proceed to describe the location of the Swift & Company plant and so forth with reference to the map which is Exhibit 1?

A. Referring to this map, Exhibit 6, the packing plant——

Q. Exhibit 1?

A. I mean Exhibit 1—pardon me—the plant that Swift & Company is located between West 65th Street and West 63rd Street and between Clark Avenue and Storer Avenue. The plant itself appears on this map immediately south of the plant of the Federal Packing Company and bears the legend "Swift & Co." This plant is served by a private sidetrack which can be identified on this map. This sidetrack connects with the New York Central Railroad at a point shortly west of 65th Street. From this connection the tracks extend across 65th Street and easterly across Swift and Company's property to the rear of its packing plant. This plant is equipped for the unloading and holding of livestock. At the rear of the plant is a platform where livestock cars can be placed for unloading. When the car door is opened the stock is driven through a short passage into pens equipped
322 for the holding and care of livestock. These pens cover an area of approximately four thousand three hundred eighty square feet or one-tenth acres and contain approximately eight pens. They have a capacity of eight cars of livestock. In this connection scale facilities are provided so that the weight of the livestock can be obtained for the purpose of settlement of freight charges. This scale is approved by and under the jurisdiction of the Weighing and Inspection Bureau, and its weights are accepted by the railroads.

Q. Mr. Tally, will you proceed to state the tariff history to the extent necessary in the present tariff situation with respect to the delivery of livestock at the Swift & Company plant at Cleveland?

A. At this point I should like to relate a situation wherein a common carrier has limited itself to the commodities it will handle for the public. Prior to November 12, 1938, the carrier, then known as the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, published in its tariff ICC No. 8785, which is a switching tariff applicable at various points on that railroad, including Cleveland, Ohio, a switching charge of $3.15 between Swift and Company, an industry served by its railroad and points of interchange with the Baltimore & Ohio Railroad, Erie Railroad, New York Central Railroad, New York, Chicago & St. Louis Railway, Pennsylvania Railroad, and Wheeling & Lake Erie Rail-
323 road. At that time livestock and all other commodities were moving from and to Swift and Company's industrial

locations, and the rates published from and to Cleveland, Ohio, were applied between the Cleveland, Cincinnati, Chicago & St. Louis Railway and all other lines serving Cleveland, Ohio. In the case of the CCC & St. L. Railway rates published to Cleveland applied to their team tracks and all industrial sidings served by that railroad. Insofar as other carriers serving Cleveland are concerned, rates published by them from and to Cleveland applied to Swift and Company's industrial siding through the medium of absorption of the CCC & St. L. Railway's switching charge of $3.15 which was applicable between the point of interchange of the CCC & St. L. Railway and the other railroads defendants in this case. There was nothing peculiar or different in this arrangement than applies at practically all other points within the United States. Under this arrangement Swift and Company was entitled to plant delivery on all of its shipments, including livestock.

Effective with November 12, 1938, in supplement 44 to CCC & St. L. Railway Company's tariff ICC No. 8785, at which time this switching charge had become $3.47, it was restricted so as not to apply on livestock.

I should like here to offer for identification my Exhibit No. 2, which is a photostatic copy of the title page and page 13 of supplement 50 to CCC & St. L. Railway Company's tariff ICC No. 8785. Attention is directed to page 13 which shows
334 that at Cleveland, Ohio, Swift & Company is an industry in the "Upper Grade Location" of the Cleveland switching district. The switching charge between the points of interchange with the railroads serving Cleveland as shown at the top and Swift and Company's industry does not apply on livestock as exemplified by the explanation of the circle 2 which appears in front of the $3.47 charge. The explanation of this circle 2 reference is in the body of the item and provides this rate will not apply on livestock. Therefore, on and after this date this common carrier did not publish a switching charge between Swift and Company's industrial location and interchange with other railroads on livestock, although at the same time it did not restrict its switching charge so as not to apply on livestock between points of interchange with the other defendant carriers and such industries as the Ohio Provision Company and the Long Dressed Beef Company, located on the rails of the CCC & St. L. Railway in the same upper grade location as is Swift and Company. The railroad, however, restricts this switching charge so as not to apply on livestock to certain other packing house industries which are located in the same general district as is Swift & Company. This information is not shown in my Exhibit 2, but I have before me a copy of supple-

ment No. 50 to this tariff which substantiates the statements
325 I have just made. I have not reproduced supplement No. 44 to this tariff which originally made the change by restricting the switching charge so as not to apply on livestock because it was not available in my office. Supplement 50, however, was available and contains the information and facts outlined. I have it in my possession if anyone cares to review it.

My next exhibit——

Q. Now, what is your next tariff exhibit?

A. My next Exhibit No. 3 is a photostatic copy of the title page and page 2 of supplement 67 to New York Central Railroad Company tariff ICC No. 8785. Attention is directed to page 2 which became effective October 11, 1939, and provided for the change in the name of the CCC & St. L. Railway Company to the New York Central Railroad Company. On and after October 11, 1939, therefore, the New York Central Railroad by this adoption notice, took over the tariffs of the CCC & St. L. Railway Company and thereafter the CCC & St. L. Railway became known as the New York Central Railroad. In other words, all industries heretofore shown as being located in the Cleveland switching district on the CCC & St. L. Railway became industries located on the New York Central Railroad. This tariff and its effective supplements are in effect today, and the title page of current supplements carries the name New York Central Railroad Company in place of the Cleveland, Cincinnati, Chicago & St. Louis
326 Railway Company. For purposes to be brought out later I should like, at this point, to state that, with the adoption by the New York Central of the CCC & St. L. Railway Company tariff, this switching charge ceased to become applicable from points of interchange with the New York Central Railroad because it then became the New York Central Railroad and there could be no point of interchange with its own railroad although the tariff still contains "between industries in Cleveland located on the New York Central Railroad and points of interchange with the New York Central W," although there is no definition of the letter "W" nor is there any explanation as to why a railroad publishes a switching charge between points of interchange on its railroad. The livestock tariffs of the New York Central Railroad publish rates to the city of Cleveland, Ohio, without any restriction as to their application to points of destination located on or served by their rails in Cleveland, Ohio. It is therefore reasonable to assume rates published to Cleveland, Ohio, by the New York Central Railroad, apply to all industrial locations, including Swift and Company, and no switching charge is necessary on traffic given a line haul movement by the New York Central Railroad. It is my contention therefore that the restriction that the switching rate

is not applicable to livestock between points of interchange with defendants other than the New York Central Railroad and
327 Swift and Company's industrial location does not have application so far as the New York Central Railroad is concerned and that further there is no necessity for a switching charge in making delivery of livestock shipments to Swift & Company's location when the New York Central Railroad receives a line haul.

Q. Just a minute, Mr. Tally; to sum up what you have been saying, is it your contention under the present condition of the tariffs, that you are entitled, so far as the tariff publication is concerned, to a delivery by the New York Central at your plant?

A. Yes, sir.

Q. Go ahead.

A. In support of that contention I should like to point out that the other defendant carriers publish rates on livestock to Cleveland, Ohio, which have application to all points served by each of these defendant railroads and where delivery is required at a location on another railroad, such as Swift and Company on the New York Central Railroad, they will absorb the switching charge of that other railroad in order to be competitive with the line-haul carrier serving the partic lar industry on traffic given a line-haul movement by the Nickel Plate Railroad, Pennsylvania Railroad, and the other defendant carriers other than the New York Central Railroad. The switching charge necessary to effect delivery at Swift and Company's plant does not apply on livestock.

328 By Mr. FITZPATRICK:

Q. Just to clear up something here, Mr. Tally, you have been referring to other defendant carriers other than the New York Central Railroad, don't you mean other the Cleveland Union Stock Yards Company and the Livestock Terminal Service Company, who are also defendants?

A. I'm referring to railroads that bring livestock into Cleveland, Ohio, as a line-haul carrier.

Q. That clears it up.

By Mr. RYNDER:

Q. Mr. Tally, has Swift & Company made certain demands upon the defendant railroads for the delivery of livestock at its plant?

A. Yes, sir; we have.

Q. Have you a copy of a demand of that kind?

A. I have; yes, sir.

Q. Please proceed to describe it.

A. We have made demands upon the defendant railroads for delivery of livestock at our plant, but those demands have been denied.

I offer as Exhibit No. 4, copy of a letter of August 14, 1941, addressed to the freight-traffic officers of the New York Central System, The New York, Chicago and St. Louis Railroad Company, the Wheeling and Lake Erie Railway Company, The Baltimore & Ohio Railroad Company, Pennsylvania Railroad, and Erie Railroad, in which we gave them notice that we would bill all
329 of our shipments of livestock for Cleveland for delivery at our plant in Cleveland and requested them to see that such delivery was made.

Q. What reply did you receive to that?

A. I next offer as my Exhibit No. 5 a letter signed by the traffic officers of said railroad companies, dated September 27, 1941, in which the railroads stated that they could not make delivery of livestock at our plant without traversing a track owned by the Cleveland Union Stock Yards Company.

Q. Have you a copy of a bill of lading illustrative of the method in which your shipments were billed to your plant?

A. I have, yes.

Q. Please describe it?

A. I offer as Exhibit No. 6 a copy of a bill of lading or livestock contract, dated at Indianapolis, Ind., September 24, 1941, signed by the New York Central Railroad Company and calling for transportation of a carload of sheep from Indianapolis, to "Swift & Co. Plant Delivery, Cleveland, Ohio." This is illustrative of the manner in which all of our billing of livestock shipments, destined to our Cleveland plant, was issued after our notice to the railroads of August 14, 1941, which is my Exhibit No. 4. So far as this particular shipment and all other shipments originating on the New York Central are concerned, or on which the New York Central receives a line haul into Cleveland, it is my contention, even under the present tariff situation as heretofore
330 described by me, no excuse existed for failure to make plant delivery of the livestock. This is because no publication of the switching charge was necessary to effect delivery on the New York Central lines in Cleveland of a shipment moving to Cleveland via the New York Central. In other words, the restriction of the switching charge which I have heretofore described would have no application to a shipment moving to Cleveland via the New York Central since the time when that line has taken over the CCC & St. L. and adopted all of its tariffs as it did on October 11, 1939. Nevertheless the New York Central Railroad declined to deliver the shipment covered by my Exhibit No. ——.

Q. 6?

A. 6, at Swift and Company's plant and did deliver it to the Cleveland Union Stock Yards. I have described this situation merely because it is illustrative. The same form of billing has been followed and the railroads in the same manner have refused to make delivery to Swift and Company's plant on all other similar shipments of livestock.

Q. Have you gained any information or understanding as to the excuse offered by the railroads for refusing to make such delivery of livestock to your plant?

A. My understanding of the excuse offered by the railroads for refusal to deliver livestock at our plant is that a portion of the track used in effecting such delivery is owned by the
331 *the* Cleveland Union Stock Yards Company. Referring to Exhibit No. 1, this portion of the track is immediately west of 65th Street, extending from a connection with the New York Central tracks (formerly CCC & St. L. tracks). Through the property of the Cleveland Union Stock Yards to another connection with the New York Central tracks near the plot of ground marked "Lasko Coal Co." on Exhibit No. 1. My understanding as to the ownership of this track is based upon statements made to Swift and Company or to me by the railroads serving Cleveland and upon statements made by Mr. A. Z. Baker, president of the Cleveland Union Stock Yards Company, in No. 284000, Ex. Parte No. 127, and in exhibits offered by Mr. Baker in connection with those cases. As supporting this information, I make reference to Exhibit 50 in No. 284000, which is a letter from Mr. F. O. Stafford, freight-traffic manager, New York Central Railroad, to the Secretary of the Interstate Commerce Commission, dated December 6, 1938. I can also refer to Exhibit 48, which is a letter of November 21, 1934, from the Cleveland Union Stock Yards Company to Mr. C. H. Williams of the New York Central Railroad, in which it is pointed out that track is leased by the stockyards to the railroads under an agreement dated June 16, 1924.

In this connection Mr. A. Z. Baker testified (docket 28400, transcript, p. 234) that a modification of the original side-
332 track agreement was finally agreed upon effective February 1, 1935, "which provided that the railroad should not have the free use of the tracks owned by the Cleveland Union Stock Yards for competitive traffic, that is, livestock."

I am not acquainted with the terms and conditions of the original agreement for the use of this track between the Cleveland Union Stock Yards and the trunk-line railroads. I am not acquainted with the details of this controversy between the Cleveland Union Stock Yards and the railroads, but I assume from the testimony I have heard, the exhibits in this group of cases,

and the letter of September 27, 1941, which is Exhibit No. 5, that the trunk-line railroads have been unwilling to pay the Cleveland Union Stock Yards the amount demanded by the stockyards for the use of its tracks in connection with the delivery of livestock. However, I do know it to be a fact that, as a result of certain transactions between the trunk-line railroads and the Cleveland Union Stock Yards, the railroads have declined to make delivery of livestock shipments at our plant or to make any delivery except through the Cleveland Union Stock Yards or more recently the facilities of the Livestock Terminal Service Company.

Q. Now, I believe it is alleged in the complaint that regardless of this treatment of livestock, the railroads do offer the same tracks, make delivery of all in-bound shipments to the Swift plant and accept delivery of all out-bound shipments. Will you please state what the facts are in that connection?

333 A. Regardless of the fact that the railroads have declined to deliver livestock at the facilities designed for such delivery at our plant, they have continued to deliver over the same tracks all other classes of in-bound traffic to our plant and to accept out-bound shipments over the same tracks from our plant. The in-bound shipments include all classes of supplies, amongst the principal of which might be mentioned such items as coal, salt, boxes, paper, lumber, and all other articles required at a packing house, including from time to time in-bound shipments of fresh meats and packing-house products. The out-bound shipments consist principally of fresh meats and packing-house products and they are transported out-bound over exactly the same tracks as those over which livestock would move in-bound to our plant. It is therefore, a fact that the railroads have not abandoned the use of this track for the general movement of freight to and from our plant, but have simply declined to deliver a single commodity; namely, livestock over those tracks.

Q. It is further alleged in the complaint that although the railroads refuse to deliver livestock to the Swift plant, they make delivery to certain other plants in Cleveland. What are the facts in that connection?

A. In paragraph VIII of our complaint we have alleged, that, in refusing to make livestock deliveries to our plant, the

334 railroads discriminate as between Swift and Company and other meat packers in Cleveland, Ohio. In my description of the tariff situation I have pointed out that the defendant railroads still provide delivery of livestock shipments at the flat Cleveland rates to the plants of the Lake Erie Provision Company, now known as the Cleveland Provision Company, the Long Dressed Beef Company, and the Ohio Provision Company. These

plants are in the same general district as the Swift plant and are so described in the tariff. I have examined the local situation to the best of my ability and I find that each of said companies; that is, the Cleveland Provision Company, Ohio Provision Company, and Long Dressed Beef Company, are engaged at their several locations in the processing of meat products. I am advised that the Ohio Provision Company receives and slaughters cattle, hogs, and sheep; that the Long Dressed Beef Company receives and processes cattle and hogs; and that the Cleveland Provision Company receives and processes cattle and some hogs. The Swift plant at Cleveland is engaged in receiving and processing all of these classes of livestock and, in a general way, it does and must obtain its supplies of livestock from the same general origin territory. It is apparent therefore that Swift and Company and the three companies named are engaged in the same locality in the same class of business.

I am also advised that the Cleveland Provision Company,
335 Long Dressed Beef Company, and Ohio Provision Company sell the products of their packing plants, which are in general the same as the products of the Swift plant, in the same general consuming territories, including Cleveland, and that there is active competition between the Swift plant and the three other packing plants in the sale of products.

The situation is that the three competitors just named can obtain delivery of livestock at their plants while such delivery is denied to the Swift plant.

Q. Mr. Tally, has there been a certain tariff or tariffs that have been filed by the Livestock Terminal Service Company, and if so, describe it?

A. There was filed with the Commission, effective August 10, 1941, tariff No. 1 of the Livestock Terminal Service Company. This tariff publishes a charge of $4.00 per deck for unloading, care, handling, and delivery to consignee, including storage for not more than twenty-four hours, of livestock consigned direct to packers at Cleveland, Ohio, and not offered for sale upon the public market. My information concerning this company is gained principally from appendices I, II, and III to the decision of the Commission of April 7, 1941 in Ex Parte No. 127, Status of Public Stock Yard Companies. I have reproduced those appendices for filing as exhibits in this case and offer them as my Exhibit No. 7.

I also offer in evidence a copy of the lease agreement between
336 the Cleveland Union Stock Yards Company and Livestock Terminal Service Company, dated May 31, 1941, which was offered as Exhibit 312 by Mr. A. Z. Baker, president of

the Cleveland Union Stock Yards Company, at the hearing in Ex Parte No. 127 at Cleveland, Ohio, November 3, 1941.

Q. That is your Exhibit 8?

A. That is my Exhibit No. 8; yes, sir.

Q. Please proceed.

A. I have with me a copy of Livestock Terminal Service Company tariff No. 1, but did not think it necessary to have it reproduced for introduction as an exhibit because it is in the files of the Commission.

Q. Well, now, do the line-haul defendants make any provisions, any tariff provisions, for absorbing the charges of the Livestock Terminal Service Company?

A. The railroad defendants herein make no provision in their published tariffs for the absorption of any unloading charge of the Livestock Terminal Service Company and publish an allowance to the Cleveland Union Stock Yards Company of only 90 cents per car for unloading of livestock at the facilities of the Cleveland Union Stock Yards Company. This appears from the following tariff provisions:

Item 490, page 71, of Agent B. T. Jones' tariff ICC No. 3587, effective August 15, 1941, appears under a caption entitled, "Allowance for loading and unloading livestock in carloads." It
337 states that where tariffs provide for the absorption of loading and unloading charges assessed by the stockyard companies the allowances to such stockyard companies will be as shown below. In item 490, under Cleveland, Ohio, it provides that an allowance is to be made to the Cleveland Union Stock Yards Company of 90 cents per car for loading and 90 cents per car for unloading carload shipments of livestock. The railroads making the allowance are listed as the Erie Railroad, New York Central Railroad, New York, Chicago & St. Louis Railroad, and Wheeling & Lake Erie Railway. It may be noted that the Pennsylvania Railroad apparently is not a part to this allowance. It may also be noted that this allowance is to the Cleveland Union Stock Yards Company and not to the Livestock Terminal Service Company, and also that the allowance is 90 cents per car while the charge published by the Livestock Terminal Service Company is $4.00 per deck, which is the same as saying $4.00 per single-deck car or $8.00 per double-deck car.

It is also to be noted that the tariff of the Livestock Terminal Service Company does not segregate the unloading charge from other charges, but lumps under the single charge of $4.00 per deck the services of unloading, care, handling, and delivery of livestock, including storage for not more than twenty-four hours. None of these services would be necessary if plant delivery were accorded to the Swift plant.

338 By Mr. FITZPATRICK:

Q. May I ask for a point of information, I don't know whether counsel should answer it or Mr. Tally. You don't contend that the provisions you referred to about unloading, or absence of a provision in the carrier's tariff, or for paying the charge by the Livestock Terminal Service Company is in point so far as traffic delivered to your plant is concerned, do you?

Mr. RYNDER. It is rather embarrassing—I think, strictly as a matter of law, as a tariff we probably owe that money to the Livestock Terminal Service Company.

Mr. FITZPATRICK. I was getting more directly at this. You don't contend that the trunk-line railroads should provide for the unloading of stock at your own plant, do you?

Mr. RYNDER. I contend they should place the car there for unloading by us.

Mr. FITZPATRICK. But not pay the Livestock Terminal Service Company for unloading?

Mr. RYNDER. That's right.

Mr. FITZPATRICK. I understand it; thank you.

By Mr. RYNDER:

Q. Up to date have you paid any charges to the Livestock Terminal Service Company?

A. No; we have not.

Q. Please state the facts in that connection.

A. It is true that up to date we have not paid to anyone the charge of $4.00 per deck made by the Livestock Terminal
339 Service Company. However, I have not been able to find any tariff authority for the absorption of that charge by the trunk-line railroads. I know that in three cases set for hearing yesterday, that is, No. 28400, No. 28421, and Sub. No. 1, the railroads are attempting to restrict their duty to unloading into proper pens, and, in No. 28421, and Sub. No. 1, are asking the Commission to require the Cleveland Union Stock Yards and the Livestock Terminal Service Company to refund to the railroads as reparation all amounts in excess of a reasonable allowance for the mere unloading of the livestock into suitable pens. As a result of this situation, a part of my concern about this case is that, since tariff No. 1 of the Livestock Terminal Service Company is a tariff of a common carrier by railroad filed with the Commission and since the absorption of its charges is not provided for in railroad tariffs, and if the Commission should decide that the railroads need not pay either the stockyards company or the service company more than 90 cents per car or some other amount less than $4.00 per car——

Q. $4.00 per deck?

A. Per deck, yes sir—the service company might in that event be able to collect from the Swift and Company the difference between its published charge and the absorption authorized by the Commission both upon past and future shipments. This would result solely from the refusal of the defendants in this
340 case to accord plant delivery of livestock to the Swift and Company plant, as requested in our Exhibit No. 4, because, in view of the facilities maintained by Swift at its plant for the specific purpose, namely, the receipt of livestock by rail, it is unnecessary for Swift to use the pens of the Cleveland Union Stock Yards or of the Livestock Terminal Service Company, or to call upon either of those companies for any services in connection with the unloading, care, handling, delivery, or storage of livestock consigned to the Swift plant at Cleveland. If we should ultimately have to bear this expense, its imposition upon us would be due solely to the refusal of the trunk-line defendants in this case to make deliveries of livestock at the plant facilities of Swift and Company.

Mr. Rynder. Mr. Examiner, that would conclude all of our direct testimony except this, that outside of the, or prior to the hearing, I had asked counsel for the New York Central Railroad to furnish for this record a copy of the original agreement between that company and the Cleveland Union Stock Yards Company for the use of the track discussed here. According to some of these exhibits and testimony, that is in agreement of June 16, 1924, although I am not certain about that date, and that it was modified in some way by a later agreement. Before closing our case in chief, I would like to make a request upon the record that that agreement be furnished for the record.

341 Mr. King. In line with your request, I have checked it over this morning and we have that agreement, one with the map and the one without the map which is already in Exhibit No. 1. The original agreement is underneath the supplement there.

Mr. Rynder. May we be off the record, please?

Exam. Carter. Off the record.

(Discussion was had outside the record.)

Exam. Carter. On the record.

Mr. Rynder. Mr. King has kindly handed me what purports to be an agreement of June 16, 1924, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Cleveland Union Stock Yards Company, and a supplement to said agreement, effective as of February 1, 1935. I desire to offer those in evidence as Exhibit 9. I have only one copy for the record.

Exam. Carter. That is all right.

(Complainant's Exhibit No. 9, marked for identification.)

Mr. RYNDER. That is all of our direct testimony.

Exam. CARTER. Mr. Tally will be back in a minute for cross-examination.

Is there any cross-examination now of Mr. Tally?

Cross-examination by Mr. CONNELL:

Q. Mr. Tally in connection with your Exhibit No. 1, I understood you to say that Swift and Company has storage space
342 on this track for approximately eight cars of livestock?

A. Yes, sir.

Q. Can you point out on the map just where that would be?

A. No, Mr. Connell, because it is not shown. We show the location of Swift and Company, but included within that location are livestock pens that are adjacent to 65th Street.

Q. Well, as I understand the situation, the square that is outlined there and marked on the inside "Swift and Company" is your plant, your main plant?

A. Yes, sir.

Q. And that these direct shipments formerly were unloaded directly into that plant?

A. Yes, sir.

Q. Through one of the doors of the plant?

A. Yes, sir.

Q. Were there any pens located outside of the plant?

A. Not to my knowledge; no, sir.

Q. All of the storage pens were inside of the plant?

A. Within what is known as the Swift and Company plant and adjacent thereto, and I mean by that they have main buildings which is the packing-house plant, and adjacent to those are the stock pens.

Q. But you had to unload and did unload all of these direct shipments directly into the plant from the car?

A. From the car into these pens; yes, sir.

343 Q. Are you sure about that?

A. I know it; yes, sir.

Q. Where are the pens located with respect to the plant?

A. Well, to be more specific, the plant unloading facilities are on the back of the plant, which is West 63rd Street. Now, they are unloaded on a platform which is a part of the plant, including the structure and so forth, and from that unloading facility they are then driven into pens that are located alongside of our plant.

Q. Which direction from the plant are these outside pens?

A. Well, let me see——

Q. I was under the impression that there was no platform between the tracks on which the livestock was placed and the plant. The stock was driven directly from the car into the plant. I may be wrong on that.

A. Mr. Connell, I should like to, if I may be permitted to, show you a picture that was taken of the unloading facilities of the Swift and Company plant through which livestock, or where livestock may be unloaded from the cars into that location as shown on that picture and they are driven into livestock pens as are depicted in these pictures which I now hand you.

Q. That confirms my impression that there was no platform between the track and your plant and that it was delivered direct from the car into your plant and then perhaps driven
344 from your plant into these outside pens.

A. You are wrong about that.

Q. The photograph shows——

A. That is part of the plant; those are driven into a pen which is alongside of our plant and a part of our plant.

Q. I don't see any platform on this photograph. Perhaps if you show me——

Mr. CONNELL. Perhaps Mr. Baker can clear it up.

Mr. BAKER. That is one question I can't answer.

The WITNESS. There is a foundation where livestock can put their feet.

By Mr. CONNELL:

Q. I think that is just a timber alongside of your plant?

A. I don't find any. I know that is foundation upon which livestock can rest their feet when they are driven from the car onto that foundation and from there driven into our plant. And, Mr. Connell, for your information that was done for many years prior to the time you refused to deliver livestock.

Q. I never refused, personally. I was out to the plant and I didn't see any platform and I don't think that that photograph indicates that platform. Regardless of that, you didn't mean to say that eight cars of livestock could be placed on the Swift property and all unloaded without respotting?

A. No—one location——

Q. Only facilities for one car at a time?

345 A. Yes; just the same as a car of salt or a car of boxes, or a car of meat.

By Mr. KING:

Q. These pens, Mr. Tally, are located between the old packing plant and 65th Street, aren't they?

A. Yes; the back end of the packing plant and 65th Street.

By Mr. CONNELL:

Q. Well, which direction of the plant on this map No. 1 would it be; south between the plant and the track?

A. Well, it would be west of the unloading facility.

Q. Between the plant and 65th Street?

A. Yes; between the plant and 65th Street would be west.

By Mr. RYNDER:

Q. Mr. Tally, just to get that straight on this map, those pens according to the directions on this map are south of the spot marked "Swift and Company"?

A. Yes, sir.

Mr. CONNELL. He said they were west.

Mr. RYNDER. I thought he made a mistake.

A. I thought you meant where our facilities were. It is west of where we unload livestock.

By Mr. CONNELL:

Q. You unload the livestock, as I understand, into the southeast corner of this square building that is marked "Swift and Company"?

A. Well, someplace—I wouldn't try to identify it exactly.

Exam. CARTER. The southwest corner or the southeast corner; which corner are you talking about?

346 Mr. CONNELL. This is north and it would be the southeast corner [indicating].

Exam. CARTER. Wait a minute; you have it turned around.

Mr. CONNELL. This is north [indicating].

Exam. CARTER. I know it is.

Mr. CONNELL. That being north, the way I have my finger would be the southeast corner [indicating].

The WITNESS. It would be the east end of the plant.

By Mr. CONNELL:

Q. South and east end of the plant?

A. You have it your way, but east is right to the north to me.

Q. I am trying to get it straight. I was out there and looked it over, and it was a very hot day, and I'm not sure my recollections are correct.

Exam. CARTER. Now, gentlemen, the record is in a rather confused state on this point so that I would like to get it straightened out.

Mr. CONNELL. I would too. I wonder if somebody around here——.

Mr. HEINEMANN. How about Mr. Turner?

Mr. FITZPATRICK. Without regard to directions, south and east and so forth, I wonder if the witness can point it out precisely where it is with regard to other outlets adjoining the Swift and Company?

Exam. CARTER. I think that would be better.

By Exam. CARTER:

Q. Which corner does the car go in?

347 A. Wait a minute——

By Mr. RYNDER:

Q. Mr. Tally, you see some tracks across the land marked "Swift and Company"?

A. Yes, sir.

Q. Then, you see a square marked "Swift and Company"?

A. Yes, sir.

Q. Now, where are these unloading pens with respect to these two objects?

A. The unloading pens are between the marks that enclose the name "Swift and Company."

By Mr. CONNELL:

Q. What do you mean by that?

A. Well, there are two lines that identifies Swift and Company by a westerly direction, one on the south side of "S" meaning Swift and Company, and the other on the north side of "O" meaning Swift and Company.

Q. You mean the lines between 63rd Street and 65th Street?

A. The unloading pens are east of the name "Swift and Company" on the track purported to serve Swift and Company, east of the name "Swift and Company."

Q. Well, now, you say the unloading plant. I understood you to say a moment ago that the unloading facility you had was this one door which opened into your plant and these unloading pens are really storage pens?

A. I will call it unloading facilities from which they are driven into livestock pens.

348 Q. Now, this photograph that you handed me of the plant door where you unload, you have unloaded livestock, isn't that door used for other purposes than unloading livestock?

A. Probably; yes, sir.

Q. You don't know exactly what it might be used for?

A. No.

Q. Do you know whether it is used for unloading livestock or other freight from trucks?

A. It is not used for unloading livestock. We don't get a chance to unload the livestock there.

Q. From trucks?

A. The trucks wouldn't unload there; they can't back up because of the rails.

Q. Are you sure that is not a cement platform there?

A. I know the rails are adjacent to the platform, and while they may be used, assuming what you are claiming, still there is unloading facilities for——

Q. Where do you unload the truck livestock?

A. Rather than have me guess——

Q. I don't want a guess.

A. Mr. Hurley, who is our local transportation man, he is here and he can give you all the actual facts if you rather have him.

Q. Let us have him, because we are not agreed on it at all. Now, in connection with this Exhibit No. 1 again, you
349 mentioned three other packing houses here, the Long Dressed Beef Company, The Cleveland Provision Company and the Ohio Dressed Beef Company, is it?

A. As I indicated——

Exam. CARTER. Ohio Provision Company.

By Mr. CONNELL:

Q. Now, where are those three concerns located on this Exhibit No. 1?

A. Well, as I understand their location is southwest of Clark Street on the main line of the New York Central Railroad.

Q. Southwest of Clark Street?

A. Yes, sir.

Q. That would be to the right-hand side of your Exhibit 1?

A. No; that would be the left of my Exhibit No. 1.

Q. Right.

A. Well, I have it in front of me right here.

Q. I have, too. Here is where I understood you to say it would be [indicating].

A. Well, here is north—this must be south [indicating].

Q. Where are they located?

A. I would call them within this triangle [indicating].

Q. That is the right-hand side of the exhibit. Don't put this on the record until we get it clear.

Exam. CARTER. Off the record.

(Discussion was had outside the record.)

Exam. CARTER. On the record. Well, wouldn't this be
350 correct: That they are located in the triangle at the lower right-hand side of the exhibit in which a designation of "Tower" appears, or at least a designation of "Tower" appears in the triangle. Is this where you mean [indicating]?

Mr. BAKER. Are you off the record?

Exam. CARTER. No; we are on the record.

Mr. BAKER. That's not right.

Exam. CARTER. Off the record.

(Discussion was had outside the record.)

Exam. CARTER. On the record.

By Mr. CONNELL:

Q. As I understand it, you don't know whether these three companies that I mentioned are served by the same track that you described in connection with your shipments?

A. I have a definite recollection that they are served by the New York Central Railroad, but not the same track that reaches our plant.

Q. That is, they don't have to use this particular track that is owned by the Cleveland Union Stock Yards?

A. I don't know anything about it. I know that they don't have to switch the car over the same track as reaches our plant as they do to get to their plant.

By Mr. FITZPATRICK:

Q. May I ask a question, please. Mr. Tally, I think that I understood your explanation as to the effect of the tariffs
351 shown in supplement 3, but may I state it this way——

A. Exhibit 3 you mean?

Q. Exhibit 3. Your point is that if that tariff had any effect at all, it applied merely to traffic which was line hauled by the New York Central Railroad into Cleveland?

A. No; my point is this: That Exhibit No. 2 provided a switching charge between points of interchange with the railroads shown at the top of Exhibit 2, and Swift and Company and the other industries located therein, and that that charge is absorbed by those railroads in reaching Swift and Company's plant. Now, Exhibit No. 3 eliminates the identity of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a separate corporation and makes it the New York Central Railroad so that industries formerly of the Cleveland, Cincinnati, Chicago and St. Louis Railway became industries of the New York Central Railroad, and that rates published to Cleveland, Ohio, included deliveries to industries on the New York Central Railroad, and no switching charge is involved.

Q. But isn't that, though, only traffic which is line hauled by the New York Central Railroad?

A. Yes.

Q. In other words, you agree with me, do you not, from and after the date in November of 1938, when the switching charge was restricted, so that it would not apply on livestock, that from
and after the date of that restriction there was no
352 switching charge which the Nickel Plate, Pennsylvania Railroad or the Baltimore & Ohio Railroad could absorb and reach your plant?

A. That's right.

Q. I got the impression from your testimony in regard to your Exhibits 4 and 6, that there was some change in the method of preparing bills of lading at or about the latter part of 1941. Am I correct in that?

A. No—no change in the bills of lading except that we routed our traffic differently and requested that the plant delivery be made on livestock.

Q. Well, let us refer to Exhibit 6. Now, as to shipments early in 1941, or during 1940, it wasn't the practice to consign shipments to Swift and Company's plant delivery, was it?

A. No, sir.

Q. How were shipments as of that period consigned?

A. I would say generally, "Swift and Company, Cleveland, Ohio."

Q. And they were delivered to you through the Stock Yard property?

A. Yes, sir.

Mr. FITZPATRICK. That is all I have.

By Mr. HEINEMANN:

Q. I have a few questions that I want to clarify the Livestock Terminal Service Company's end of this. In your reference to our tariff ICC No. 1——

353 The WITNESS. May we have a recess for about five minutes, please?

Exam. CARTER. Yes.

Mr. HEINEMANN. Surely.

Exam. CARTER. We will take a short recess, gentlemen.

(Recess had.)

Exam. CARTER. Any other questions of Mr. Tally?

By Mr. HEINEMANN:

Q. Mr. Tally, in referring to the tariff of the Livestock Terminal Service Company, do you agree with me that there is no indication that those charges must be collected from the line-haul carriers?

A. Nothing in that tariff to indicate that it has to be collected from other than those who used it.

Q. Does it differ in any respect with the other stockyard's loading and unloading tariffs?

A. Well, it is different.

Q. I mean, in that one respect?

A. It provides a charge in connection with the line-haul movement of livestock, for delivery of livestock.

Q. With respect to that complaint, and to your references to certain provisions in there, and to your exhibit which sets forth our lease agreement with the Cleveland Union Stock Yards Company, do you agree with me that so far as the Terminal is concerned, we have nothing whatever to do with the track that serves your company, or the property over which that track runs,
354 or the ownership of the track?

A. Yes, sir.

Q. I might have misunderstood you, and if I did, I won't pursue the question. I thought you said, or at least implied that Cleveland is the only place in the United States where you could not deliver livestock to your plant, the same as you did to the other places?

A. I think that is a correct statement, Mr. Heinemann, for this reason, so far as other than the New York Central Railroad is concerned, there is no charge, nor rate for the movement of livestock from, and interchange with the Nickel Plate, for example, to the Swift and Company. At other places in the United States direct delivery may be made at a charge, whatever that may be, it doesn't make any difference—it might be five dollars or twenty-five dollars.

Q. There are plants of Swift and Company where the charge would be more than if the stock went through the stockyards; isn't that true; for instance, at Chicago?

A. Well, if we are going to measure the charge, I will say that I don't know, without check of the yardage charge against the switching charge, but there is a place to come out into our plant at a charge when it comes via all railroads who use Chicago as an example.

Q. As a matter of fact, isn't the majority of Swift and Company livestock delivered through the facilities of public
355 stockyards rather than direct to your plants and by that I measure the volume and not the plants?

A. No; that is wrong; we probably do not receive five cars a year through the Chicago plant, because it comes through another facility. At Kansas City we get them direct at our plant. I wouldn't venture to say what we do at all our plants, because we have a lot of them, without checking into them. It is possible to receive at our plant any place in the United States, except Cleveland, Ohio, outside of my interpretation of the tariff, so far as the New York Central is concerned, and other railroads serving Cleveland other than the New York Central, there is no rate from the interchange, for example the Nickel Plate Railroad to the Swift and Company plant.

Q. Getting the cases, for example, how many of your livestock to Sioux City is for unloading?

Mr. RYNDER. I object to that; that is not relevant to any issue.

Mr. HEINEMANN. Mr. Examiner, the witness made the statement that this is the only place in the United States where the condition existed which caused them to get their shipments through the stockyards or terminal facilities.

Mr. RYNDER. No; I don't think we ever said that.

Mr. HEINEMANN. I so undertsood it. If I am wrong, I wish the witness to correct me.

356 A. I think I stated, Mr. Heinemann, that at every other place in the United States we have a charge for direct delivery of livestock to our plant, except Cleveland, when the livestock comes in on railroads other than the New York Central Railroad; may be fifty dollars or five dollars, but they still have a way of getting it in there.

By Mr. HEINEMANN:

Q. You don't mean to apply it to all the other points the railroads effect its delivery on a line-haul rate?

A. It may be additional.

Q. As a matter of fact, it is additional at a great many of those points, is it not?

A. Yes, sir; that would apply to Chicago.

Q. I think you said, to——

By Mr. RYNDER:

Q. Let me see; are you covering all of Chicago in one breath?

A. I mean Chicago—Swift and Company's plant at Chicago identified as within the Union Stock Yards, not including the Omaha Packing Company.

Q. You don't pay a rate to have your Omaha Packing Company delivered.

A. No, sir; that is absorbed by the railroads.

By Mr. HEINEMANN:

Q. But that does cost you money to move it from the Omaha down to your plant?

A. That is outside of the railroad transportation, yes.

357 Q. I think you had said that you never had paid charges to the Livestock Terminal Service Company, and I would like to ask you if you hadn't paid where you exceed the storage limits, our bills for storage?

A. I don't know that; I suppose our local man would know; that is something beyond the mere transportation of livestock.

Q. But it is covered by our tariff.

A. I assume so, or you couldn't collect it.

Mr. HEINEMANN. I think that is all, Mr. Examiner.

Exam. CARTER. Any other questions?

Mr. BAKER. No questions.

By Mr. CONNELL:

Q. I have just one question before you leave. When you said that you had a storage space there for eight cars, you meant pen storage space rather than track storage?

A. Yes.

Q. You mean eight single deck or eight double deck?

A. I would prefer to have Mr. Hurley answer, if I might.

Mr. CONNELL. That is all.

Exam. CARTER. Any other questions? (No response.)

Mr. Rynder, do you have any more?

Mr. RYNDER. No further questions.

Exam. CARTER. That is all; you are excused. (Witness excused.)

Mr. RYNDER. I would like to call Mr. Hurley.

J. H. HURLEY was sworn and testified as follows:

358 Direct Examination by Mr. RYNDER:

Q. State your name please.

A. The name is J. H. Hurley.

Q. Mr. Hurley, please state your position.

A. I have charge of the transportation department of Swift and Company in Cleveland, Ohio.

Q. Mr. Hurley—if the Examiner will be kind enough to let you do so, look at Exhibit 1. You were present and heard the discussion of the location of some pens adjacent to the Swift track, which would hold approximately eight carloads of livestock?

A. Yes.

Q. Will you please, on Exhibit 1 place an "X" showing the location of the said eight pens?

Exam. CARTER. You want him to do it with pencil so that we can rub it out?

Mr. RYNDER. With pencil.

Exam. CARTER. He is using a pen.

By Mr. RYNDER:

Q. And before you put it down, get it right. My impression was it was right here [indicating].

A. Just a minute please.

Q. Isn't this 65th Street [indicating]?

A. Yes.

Q. Aren't the pens here where my finger is [indicating]?

A. This, I assume is the building. I haven't gone over
359 these. The pens are located just about right here; just about there.

Q. Well, then answer my question: Put an "X" mark in pencil showing the location of said eight pens?

A. Yes, sir [marking exhibit].

Mr. Rynder. Now, if any other gentlemen want to get that on their exhibit, please note where it is.

By Mr. Rynder:

Q. Now, there has been some discussion here about the place at which the car is spotted for unloading livestock so that the contents of the car can be driven into the pens. Will you please, in a similar manner, mark on Exhibit 1 in pencil the approximate location of that unloading pen and mark it with the letter "Y"?

A. Letter "Y"?

Q. Yes.

A. All right, sir [marking exhibit].

Q. Now, there was some question asked as to where you have unloading facilities, if any, for the receipt of livestock by truck. I ask you on Exhibit 1 to mark such facility, if any, by the letter "Z".

A. All right, sir [marking exhibit].

Q. Now, there were some questions as to the approximate location on this map of the plants of the Cleveland Provision Company, the Ohio Provision Company, the Long Dressed Beef Company. Will you please mark on Exhibit 1 with the letter "A" the approximate location of those three plants?

360 A. Yes sir. The letter "A"?

Q. The letter "A".

A. That is the Cleveland Provision [indicating].

Q. Well, then, what does the letter "A" represent?

A. The Cleveland Provision.

Q. Which one will you mark next?

A. The Ohio.

Q. Mark it with the letter "B".

A. All right [marking exhibit].

Q. Will you please mark with the letter "C" the approximate location of the Long Dressed Beef Company?

A. They are right about in here; just about along in here.

Mr. Rynder. Please let us state for the record that the letter "A" represents the location of what?

A. The Cleveland Provision Company.

By Mr. Rynder:

Q. The letter "B" represents the location of what?

A. Ohio Provision.

Q. The letter "C" represents the location of what?

A. The Long Dressed Beef Company.

Mr. RYNDER. Now, Mr. Examiner, since the location of unloading facilities, pens, and three packing companies have been marked on Exhibit 1 by letters, the meaning of which are located in the record and I would like to have it understood that we
361 may disregard the prior testimony regarding the points of the parties.

Exam. CARTER. I think that is satisfactory by everybody and desired.

Mr. RYNDER. Thank you. That is all I have.

Exam. CARTER. You may cross-examine.

Cross-examination by Mr. CONNELL:

Q. Mr. Hurley, will you state just what these pens consist of?

A. Well, the pens are just similar to the pens in the Cleveland stockyards.

Q. They are outside pens?

A. No, sir; they are covered pens; covered pens, except just a small portion of about three of the pens are practically uncovered, but the others are all covered pens.

Q. What I meant was that you have some storage space in your plant?

A. Well, the pens are located on Swift and Company's property, but they are not in the plant.

Q. Well, as I understand it, you unload the livestock, or you did, from the car at this point "Y" directly into your plant?

A. It goes through a portion of the building which we term a runway.

Q. And then out into these pens?

A. Into the alleys and right into the pens; yes, sir.

Q. What sort of unloading facility do you have there;
362 was there a platform behind the building in the back?

A. It is a brick building and the door is considerably larger than a car door. Of course, we simply put down a steel platform or a wooden platform. We have used them both, with sides on them, and the distance between the car and the building is the legal distance allowed by law, and they run right through that into this concrete runway, into the alleys and the pens.

Q. There is no permanent platform between your building and the tracks?

A. Oh, no; this is a concrete runway—it is what we term the runway.

Q. That is inside your brick wall?

A. Inside; yes.

Q. Outside of your building and crossing the track there is a concrete roadway, isn't there?

A. You mean after the livestock leaves the car?

Q. I am not speaking of the cattle at all. I am speaking of outside of your building there is a concrete driveway that crosses the track that serves your building.

A. That concrete driveway, there is one there, and one a little farther north of that. We sometimes unload trucks there, but not livestock. We use it for other purposes, but not truckloads of livestock.

Q. Now, approximately how much storage space do you have there at the plant; square feet?

363 A. We have what?

Q. Square feet.

A. We gave that to Mr. Tally. I don't have it in feet. I can tell you the number of pens. We have eight pens. We can take care of eight carload of eight double decks.

Q. You have sufficient storage space for eight double decks?

A. That is correct; yes, sir.

Q. At the time when you were receiving direct shipments at your plant, you were also receiving some shipments through the Cleveland Union Stock Yards, weren't you?

A. As I recall; yes, sir.

Q. How long have you been located here at Cleveland?

A. About seventeen years.

Q. About seventeen years. Well, taking the year 1934, for example, I wonder if you could tell us approximately how the shipments received direct at your plant compared with the shipments received through the Cleveland Union Stock Yards.

A. I couldn't answer that offhand.

Q. I have before me here Exhibit No. 18, which was offered in evidence in Docket No. 28400, which shows that in 1934 Swift and Company received direct at its plant over the New York Central Railroad and the Big Four, three hundred and forty cars, and through the Cleveland Union Stock Yards, one hundred nineteen cars, and by the Nickel Plate direct to its plant, three hundred ten cars, and through the Cleveland Union Stock

364 Yards, seventy-four cars; via the Pennsylvania direct; thirty-three cars; and through the Cleveland Union Stock Yards, fifty-nine cars; via the Baltimore and Ohio Railroad, two cars direct; and through the Cleveland Union Stock Yard, one car; and via the Erie Railroad, four cars direct; and none through the Cleveland Union Stock Yards. Is it your recollection that that was about the correct proportion which they received?

A. As I say, I couldn't tell you because I had no reason to keep up with those figures. The unloading is handled by the superintendent. I pay no attention to the unloading whatever.

Q. How many carloads of your livestock does your company slaughter per day here?

A. That varies; I couldn't answer that because that is a matter our superintendent would have to answer. I am the transportation man. As far as the slaughtering, I couldn't answer that.

Q. You don't know, approximately?

A. No, sir.

Q. What the maximum cars would be?

A. No; I don't.

Q. Are you familiar with the in-bound shipments by truck as well as by rail?

A. Yes; so far as the routing and who handles them, and so forth, yes.

365 Q. How about the proportion you received by truck versus by rail; can you tell us that?

Exam. CARTER. What is the purpose of that examination, Mr. Connell?

Mr. CONNELL. I was trying to find out how this storage space would take care of all their in-bound traffic.

Mr. RYNDER. I am not contending that it would.

Mr. CONNELL. Well, what is your position on that, Mr. Rynder?

Mr. RYNDER. I am contending that it would take care of eight cars at one time.

Mr. CONNELL. And that, if you were permitted direct delivery, that you would ship all of your direct shipments by rail direct to your plant?

Mr. RYNDER. We certainly wouldn't if we had thirty cars coming in at one time, and on the other hand, we would if we had seven.

Mr. CONNELL. You admit that under usual working conditions, that you would have to use the facilities of the Cleveland Union Stock Yards at the time?

Mr. RYNDER. I would not.

Mr. CONNELL. You wouldn't admit that?

Mr. RYNDER. No; but I admit that if we had eight cars to unload at a certain moment, we would have to do something with those pens, and we have a right to do so. If we have

366 ten carloads of cattle, we can't get them unloaded at one time.

By Mr. CONNELL:

Q. Mr. Hurley, what would you do with the stock in excess of eight cars?

A. Well, that would depend on how much time we had. I would say according to law, the thirty-six-hour limit.

Q. Where would you start? You only have storage space for eight cars; where would you start?

A. I assume no other place but the Union Stock Yard.

Q. Are you using the stockyard for livestock now?
A. We have twenty-four hours free time.
Q. Free time?
A. Twenty-four hours free time.
Q. I didn't know that there was anything free around here.
A. Is that right, Mr. Baker?
Q. Mr. Baker says that's right.
A. After that time, of course, if we hold them longer than that, we are supposed to, we have to pay according to the tariff charges.
Q. Do you have tariff charges for bringing livestock over to the stockyards?
A. No, sir; that is up to the superintendent.
Q. You don't know how long it is left over there?
A. No, sir.

By Mr. FITZPATRICK:

Q. These eight pens that you referred to, what are they
367 used for since the stock is not delivered by the railroads?
A. As a usual thing we would bring stock over from the stockyard and put them in those pens, so that we wouldn't be assessed for charges for holding over the length of time. In other words, we hold them there instead of at the stockyards.
Q. Some of the shipments that you receive at your plant, do they find their way into those pens?
A. Yes, sir. I marked on this exhibit where the trucks unload, and they go into the same alleys and the same pens as stock arriving in cars, but it is received at a different entrance.
Mr. FITZPATRICK. That is all. Thank you.
Exam. CARTER. Any other questions?
Mr. CONNELL. Mr. Rynder, you don't contend that any track of the Cleveland Union Stock Yard is used in delivering livestock to the Long Dressed Beef Company, the Cleveland Provision Company or the Ohio Provision Company.
Mr. RYNDER. I made no contention on that.
Mr. CONNELL. Well, will you admit they are making deliveries to those plants, that no track of the Cleveland Union Stock Yard is used?
Mr. RYNDER. I believe that to be a fact.

By Mr. CONNELL:

Q. That is a fact, Mr. Hurley, isn't it?
A. Yes, sir; because they are located on the main line of the New York Central Railroad, as I understand it.
Exam. CARTER. Any other questions? (No response.)
368 That will be all, Mr. Hurley; you are excused.
(Witness excused.)

We will recess this case for a short period.

(Recess had.)

Exam. CARTER. We will go back on the record with Docket No. 28714.

Stipulations as to certain facts

Mr. RYNDER. I believe Mr. King wanted me to stipulate the facts, which I am willing to do.

Mr. KING. Do you want me to state them?

Mr. RYNDER. You may state them.

Mr. KING. We ask Mr. Rynder to stipulate that track shown on Exhibit No. 1 in this Docket No. 28714 and referred to as 245 N. Y. C.—N. Y. C. No. 26A or Local No. 10 south of the right-of-way of the New York Central Railroad Company is located entirely on land owned by the Cleveland Union Stock Yards Company, and the 1,619 feet of said track extending south from the southerly right-of-way line of the New York Central Railroad Company is owned by the Cleveland Union Stock Yards Company. The Cleveland Union Stock Yards Company does not operate said track. The track is operated by the New York Central Railroad Company for the transportation of all commodities other than livestock. No direct livestock is carried over said track.

And the second one is: That the plants of the Ohio Provision Company and Long Dressed Beef Company, which
369 are located on the north and west sides of the main track of the Big Four opposite the stockyards are not served by any of the tracks of the Cleveland Union Stock Yards Company nor is the track of the Cleveland Provision Company, which is on the east side or south side of the track of the Big Four; that is to say, the tracks of the Cleveland Union Stock Yards Company are not involved in serving either of those packing plants.

Mr. RYNDER. Well, I believe the statement by Mr. King is correct and I am willing to stipulate that it may be accepted as the facts for the purpose of deciding this case.

Mr. KING. There is another matter there that I might speak to Mr. Baker about, first.

Mr. RYNDER. Mr. Examiner, I desire to offer in evidence the exhibits heretofore marked for identification Nos. 1 to 9, inclusive.

Exam. CARTER. Any objection?

Mr. HEINEMANN. None whatever here.

Exam. CARTER. They will be received in evidence.

(Complainant's Exhibits 1 to 9, inclusive, Witness Tally, received in evidence.)

I don't have the amount that the Cleveland Union Stock Yards Company is asking the railroads for the use of that track to haul livestock over it. We might supply that amount which is shown

in Mr. Baker's letter to the railroads which was based on the yardage charges applicable to direct stock as contained in
370 the Cleveland Union Stock Yards Agricultural Tariff No. 5.

Exam. CARTER. Filed with the Secretary of Agriculture?

Mr. KING. Yes. Filed with the Secretary of Agriculture. I will be glad to supply the amount and indicate that the failure to use the track for livestock is due to the fact that the New York Central could not see its way clear to pay for the privilege what the Cleveland Union Stock Yards is seeking to collect from the railroads. Those are fixed in the letter from the Cleveland Union Stock Yards to the New York Central Railroad.

Mr. RYNDER. I don't have any objection to those letters being filed later.

Mr. BAKER. You want the rate or charge?

Mr. KING. The rate.

Mr. BAKER. The rates I can give you. They are as follows: It was twenty cents a head on cattle. Twelve and a half cents a head on calves; seven and a half cents a head on hogs; and five cents a head on sheep.

Exam. CARTER. You are willing to stipulate that, are you, Mr. Rynder?

Mr. RYNDER. Yes.

Exam. CARTER. With those stipulations, do I understand that the defendants do not desire to offer any testimony other than already has been put into this record?

Mr. KING. As I understand, as far as the New York
371 Central Railroad is concerned, we are satisfied to stop where we are on the introduction of evidence.

Exam. CARTER. Does that apply also to all the other defendants?

Mr. BAKER. So far as the stockyards is concerned, the record should show—I think you included that, Mr. King?

Mr. KING. That's right.

Mr. HEINEMANN. I think, Mr. Rynder, in our discussion over there, was in accord with the stipulation he was able to enter into—to get rid of our ten cents worth—if Mr. Rynder will be good enough to suggest that.

Mr. RYNDER. I understand Mr. Heinemann to construe the complaint in Docket 28714 as directly attacking the reasonableness of the charges of the Livestock Terminal Service Company for shipments which used the facilities of the Livestock Terminal Service Company. I had not intended our complaint to be so construed. My contention as to that is, for an illustration, if we should have to pay three dollars out of the four-dollar charge of the Livestock Terminal Service Company for service through its facilities on shipments which we have consigned to our plant, and upon which we desire plant delivery, that that arose through a

direct action of the railroads as refusing us delivery as we were asking against the line-haul railroads. I hope I made myself clear on that.

Exam. Carter. I understand your complaint to be to that
372 effect.

Mr. Heinemann. If Mr. Rynder is willing to stipulate to the——

Mr. Rynder. I am willing to state here that I am not seeking reparation against the Livestock Terminal Service Company.

Mr. Baker. Or the Stock Yards Company.

Mr. Rynder. For livestock handled through their facilities, but that if we incurred charges there by reason of the refusal of the line-haul defendants to make a delivery to our plant, we are seeking such damages as may be incurred by reason of what we consider the wrongful refusal of the line-haul defendants to make delivery to our plants, thereby causing us to incur the published charges of the Livestock Terminal Service Company.

Mr. Heinemann. That is quite acceptable to us, Mr. Examiner.

Exam. Carter. Anything further?

Mr. King. May I submit that I was more or less mixed up in my statement of the matter? It is just a matter of editing, to see if I stated what I stated.

Exam. Carter. You mean in connection with your stipulation?

Mr. King. Yes.

Exam. Carter. Could you write that stipulation out, Mr. Reporter?

373 The Reporter. Yes.

Exam. Carter. You can correct it then, Mr. King, and submit it to Mr. Rynder for his approval.

Mr. King. I will do that.

Exam. Carter. Do you gentlemen want a proposed report in this case, No. 28714? I suppose you do.

Mr. Rynder. I would like to have one, and I would like to have a reasonable time in which to file a brief.

Mr. King. That is satisfactory to us.

Exam. Carter. June 1, will that give you plenty of time?

Mr. Rynder. I think so.

Exam. Carter. Briefs in Docket No. 28714 will be due on June 1, 1942.

Is there anything further before the Commission in this proceeding? (No response.)

If not, the hearing is closed.

(Hearing was concluded at 5:15 o'clock P. M.)

375 Before the Interstate Commerce Commission

Docket No. 28714

SWIFT & COMPANY, COMPLAINANT

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., DEFENDANTS

CLEVELAND HOTEL,
Cleveland, Ohio, Thursday, June 22, 1944.

Met pursuant to notice at 9:30 o'clock a. m. E. W. T.

Before T. LEO HADEN, Examiner, Interstate Commerce Commission.

Appearances: As heretofore noted.

Additional appearance: M. S. Farmer, 802 Engineers Building, Cleveland, Ohio, appearing in behalf of the Cleveland Union Stock Yards Company, Defendant.

379 PROCEEDINGS

Exam. HADEN. Come to order please, gentlemen.

The Interstate Commerce Commission has set for further hearing at this time and place, Docket No. 28714, Swift & Company versus the Baltimore & Ohio Railroad Company, et al.

The parties will state their appearances and in doing so please indicate whether all who enter appearances are actually present at this hearing, and if written appearances haven't already been filed, they may be filed at this time.

For the Complainants?

Mr. RYNDER. R. D. Rynder.

Exam. HADEN. For the Defendants.

Mr. PIERCE. For the New York Central Railroad there is of record W. N. King and D. P. Connel, both of whom are not present today, but they have been here previously; and R. R. Pierce, on behalf of the New York Central.

Mr. FITZPATRICK. Kemper A. Dobbins and John J. Fitzpatrick for the N. Y. C. & St. L. Railroad company; both being present.

Exam. HADEN. Any other appearances?

Mr. FARMER. A. Z. Baker and M. S. Farmer for the Cleveland Union Stock Yards Company, both present.

Exam. HADEN. Are there any further appearances to be entered (No response.)

There is no free copy of the record in this proceed-
380 ing furnished by the Commission. Parties desiring copies of the transcript should place their order with the reporter.

The prior hearing in this proceeding was held some two years

ago. A proposed report was issued by Examiner Carter and served upon the parties on April 1, 1943. An oral argument was had before the entire Commission on June 4, 1943. By order of the Commission of June 14, 1943, No. 28714 and Ex Parte 127; Status of Public Stock Yards Companies were reopened for further hearing and further consideration. As I have just stated, Docket No. 28714 has been assigned for further hearing at this time and place.

The parties, among other things, will be expected to produce evidence bearing upon the questions raised at the oral argument in this proceeding.

The Complainant may call their first witness.

Mr. FITZPATRICK. Mr. Examiner, may I be clear on this? As I understand your statement, the only evidence to be received here is that in Docket No. 28714.

Exam. HADEN. That is correct.

Mr. FITZPATRICK. Thank you, sir.

Mr. RYNDER. Mr. Examiner, I would like to say a word in explanation: That following the Commission's statement for further hearing, I went over the oral argument and I made a memorandum of what question I thought were asked that could be answered factually and not just a legal conclusion. I furnished a copy of that to Mr. Pierce.

381 Page 102 of that argument, Mr. Pierce said in response to a question from one of the Commissioners: "There are industries over there; there is one coal company over there and there are about five or six industries that are served." We are prepared to show what those industries are, and I believe they agree with the list that Mr. Pierce has.

Now, there was a question as to when the original track serving the present Swift plant was put in and under what conditions. I haven't been able to find the answer to that and I am very doubtful as to whether Mr. Pierce has. We can show by our witness that we bought that plant from a predecessor company in, I believe, January 1905, and as we understand it, the track crossing 65th Street—anyway, the track leading from the then Big Four tracks on the stockyards side of the street across 65th Street into the plant which we purchased at that year, to the best of my knowledge and belief was in there when we purchased it, and we haven't been able to find any agreement as to the building of that original track connection for the conditions under which it was to be operated, although certain later agreements were made as to certain extensions of that track. I believe Mr. Pierce probably has those too.

Then question on page 109 of the oral argument, Mr. Pierce said, "This whole thing around the stockyards—industry has

grown up and all these relations between the railroads and the stockyards have been gone into in Docket 28421." As
382 to that, I made a suggestion prior to the hearing that we could stipulate in, to be treated as facts, either the decision of the Commission in that case or any part of the record, and I believe that one or another of these suggestions is agreeable to Mr. Pierce. I will leave him state what he desires to do about that.

As to any tariff arrangements dealing with this track, so far as they may have dealt with, they were shown on the former hearing by Exhibit 3 and certain later exhibits. We have made an investigation of the railroad tariffs, which so far as the tariffs show anything concerning it, goes back to 1904 prior to the purchase of our plant.

That in a brief way is the statement, and I am not sure about Mr. Pierce, that he has some matters which he would like to say and put in before we go ahead.

Mr. PIERCE. I believe that is right. If the Examiner please, we have made an extensive search for all records pertaining to the early history of the Swift & Company's track at that time, which I understand in 1905 was the Peoples Packing Company, or Peoples Provision Company, and also a part of that track now embraces what was at that time the Federal Packing Company and the Federal Packing Company was acquired by Swift & Company. I will have to ask Mr. Rynder to supply that.

Mr. RYNDER. 1930.

383 Mr. PIERCE. 1930. Back in the early stages, the Big Four Railroad, of course, owned and operated the property extending out of Cleveland towards the southwest to Cincinnati, and in 1930 the New York Central took that over as lessee and operated it.

In trying to locate some of the files, Mr. Cobb of our Land Department went to Cincinnati and Springfield, Ohio, and inquired around all of our offices in Cleveland and communicated with the traffic department of Chicago which in the early days handled the Big Four matters.

We have uncovered a number of agreements and one file of correspondence which we were able to locate in the last three or four days; so, we had in mind offering in evidence all the side-track agreements which are involved with industries, being stockyards track No. 10 and any history in our possession in connection with that track, and also the early history of the transactions with Swift & Company as far as we could get those facts.

Some of the records of the Big Four, which were stored at Cincinnati were destroyed in the flood of 1937, so, we are bringing

in, proposing to bring in here, all the records which we have been able to find.

With reference to Docket No. 28421, it is our thought that we might stipulate the Commission's findings, which, as they may be relevant to the evidence here, ought to be introduced
384 in evidence here as an exhibit in this case. As I say, some parts of that are not relevant to the argument here, but we think that the entire findings might be introduced subject to their relevancy in the controversy here.

Mr. RYNDER. Just before you leave that, since that is brought up, couldn't we stipulate as either party will agree to the Commission treating as a fact in this case any evidence found in the decision of that case?

Exam. HADEN. Yes. You will make a formal offer on that in connection with the stipulation and you will cover that later on in the form of testimony.

Mr. PIERCE. We might as well dispose of it at this time.

Exam. HADEN. Will you read what Mr. Pierce stated so that we have a clear understanding of what the stipulation is?

(Thereupon the reporter read the record.)

Exam. HADEN. Does that cover it, Mr. Rynder?

Mr. RYNDER. Well, I merely added the suggestion that instead of taking this and having it copied and put in as an exhibit, since it is a decided case, we could stipulate that the Commission may treat as a fact in the present proceeding any facts found in the decision in Docket 28421, which appears at 255 I. C. C. 579.

Exam. HADEN. Mr. Rynder's suggestion is agreeable to you, Mr. Pierce?

385 Mr. PIERCE. That is agreeable to us.

Mr. RYNDER. While we are on that——

Exam. HADEN. It is entirely agreeable then.

Mr. RYNDER. It just occurred to me that there may be some more facts that one or the other of us might want to refer to in the very recent decision of the Commission in Finance Docket No. 14038, Livestock Terminal Service Company—abandonment of operation; I would be glad to suggest the same stipulation as to that case.

Mr. PIERCE. It is all right with us.

Exam. HADEN. Is it agreeable to all parties? (No response.) Let the record so show.

Mr. BAKER. We would like to have the right to introduce additional evidence with reference to any of those points.

Mr. RYNDER. Oh, certainly.

Exam. HADEN. With that understanding it will be so understood.

Mr. PIERCE. That is, that all parties may introduce further evidence on that.

Exam. HADEN. Yes.

Mr. RYNDER. I think I interrupted you, Mr. Pierce.

Exam. HADEN. Mr. Pierce.

Mr. PIERCE. We should also like to stipulate in connection with the testimony of Mr. Marsh in Ex Parte 127, we will offer
386 that later in the hearing, and we will offer these exhibits as we go along, Mr. Examiner.

Exam. HADEN. Do counsel desire to make any further statements prior to the calling of the first witness for the Complainant? (No response.)

Mr. Rynder, proceed please.

Mr. RYNDER. I will. Mr. Ford.

GILBERT F. FORD was sworn and testified as follows:

By Mr. RYNDER:

Q. Give the reporter your name.

A. Gilbert F. Ford, Assistant Manager of Swift & Company, Chicago, Illinois.

Q. Approximately how long have you held that position, Mr. Ford?

A. 24 years.

Q. Mr. Ford, in preparation for your testimony in this case, did you read the testimony offered by Mr. G. F. Tally on behalf of the Complainant at the first hearing in this case?

A. I did.

Q. And you are familiar with the testimony there given as to the Swift plant, the track lay-outs and all the matters concerning which Mr. Tally testified there?

A. Yes.

Q. And tariff matters?

A. Yes.

387 Q. In addition to that, to familiarize yourself with the physical facts of the case, did you make a visit to Cleveland in the recent past?

A. The early part of May; I think it was May 11th I visited Cleveland and inspected the properties.

Q. Did that inspection include going over on foot the connections of the stockyard tracks here mentioned with the New York Central, and the tracks leading around to the Swift plant and the industries beyond it? You inspected all that visually?

A. Yes.

Q. You are familiar with the location?

A. Yes.

Q. Did you make any other inspection of that property yesterday?

A. I did.

Q. Have there been any physical changes in the track lay-out that were described in the testimony of Mr. Tally and the other witnesses at the first hearing?

A. No.

Q. They are the same as at the time of the hearing?

A. That is correct.

Q. Has there been any changes in the tariffs applicable to the delivery of livestock at the Swift plant since that time?

A. No.

388 Q. In other words, is it substantially correct to say that all the facts shown in the first hearing are in existence and in the same manner and same effect today?

A. Yes.

Q. Now, did you make an effort to find whatever reference there may be to switching to the Swift plant with predecessor companies, as shown in the tariffs of the New York Central Railroad, or its predecessor, the Big Four Railroad?

A. Yes; I made a trip to Cincinnati the day following the May trip to Cleveland, and inspected the tariff files of the carrier and prepared information from April 1904.

Q. Now, before you go into that, did Swift & Company own the original plant which is now part of the Swift plant?

A. No.

Q. How did it obtain it?

A. By purchase on January 24, 1905.

Q. According to the records of Swift & Company, what was the name of the company from whom that plant was purchased?

A. Peoples Packing & Provision Company.

Q. Was there a later purchase by Swift & Company in that immediate neighborhood; I mean immediately north of its original purchase of that property?

A. Yes; that property was formerly known as the Federal Packing Company.

Q. Have you the date of that purchase?

389 A. I do have the date of the purchase; I believe it was stated by you.

Mr. RYNDER. If you are agreeable, Mr. Pierce, our records show that it was on September 27, 1930.

Mr. PIERCE. We have no reason to doubt that.

By Mr. RYNDER:

Q. Have you prepared an exhibit from the information that you obtained from the railroad tariffs concerning deliveries at the Swift & Company plant?

A. Yes; this exhibit is the first part, or in the first part is a chronological statement of the switching charges, April 23, 1904, to the present date.

Mr. RYNDER. I believe it has been distributed to the parties. Before we proceed, may we have it marked as "Exhibit No.——"

Exam. HADEN. Exhibit No. 10.

(Exhibit No. 10, Witness Ford, marked for identification)

By Mr. RYNDER:

Q. Proceed now with your explanation of it.

A. Swift & Company purchased the property known as the People's Packing & Provision Company on January 24, 1905. This exhibit in the first part is chronological statement of the switching provided by the Cleveland, Cincinnati, Chicago and St. Louis Railroad at Cleveland, Ohio, from April 23, 1904, to the present date.

390 At that early date the carrier better known as the Big Four provided in their tariff ICC 2183 that the People's Provision Company was an industry on that line at Cleveland. In addition thereto the tariff provided a charge of $2.50 per car for switching carload traffic received from connecting lines.

Q. May I interrupt?—The date you speak of, April 23, 1904, was before the purchase of the property by Swift & Company?

A. It was before the purchase of the company by Swift & Company, and I may say that it was the earliest date I could find in the carriers' files.

By Mr. PIERCE:

Q. May I interrupt here? Did I get the correct date of the People's Packing & Provision Company purchase; what was that?

A. January 24, 1905.

By Mr. RYNDER:

Q. All right, proceed.

A. Therefore, on traffic consigned to People's Provision Company via the Big Four Railroad, delivery of the car to the People's Provision siding was made by the carrier and cars that reached Cleveland by other lines consigned to the People's Provision Company were switched to the Big Four and delivery made at the People's Provision Company siding by the Big Four. In the latter case, the carriers bringing the cars into Cleveland absorbed the $2.50 per car reciprocal switching to cover the service

391 of delivery at the People's Provision Company siding by the Big Four. Thus the delivery of shipments to the siding of the People's Provision Company whether the line-haul service was by Big Four or a connecting line was at the current rates without any additional charge for switching.

This tariff was in effect prior to the purchase of the People's Provision Company by Swift & Company. The tariffs of the Big Four continued without change until July 15, 1909, except that by ICC 3798, effective July 27, 1907, the name was changed to People's Packing Company, when the word "grade" was added and this merely indicated the area of Cleveland in which the industry was located. However, at this time the name Swift & Company was not added to the tariff even though Swift & Company bought these properties in 1905. The same arrangement remained in effect until February 2, 1915, when the Big Four by Supplement 19 to ICC 6354 added Swift & Company as an industry on its line. All of the other conditions remained the same.

On August 26, 1920, the Big Four issued tariff ICC 7526 in which People's Packing Company was eliminated from the tariff. However, the name Swift & Company continued. On July 31, 1922, by ICC 7886, the carrier changed the area from grade to upper grade by which it is known today. The next change appeared in Big Four ICC 8385 on September 5, 1927, when the reciprocal switching was increased to $3.15 and this remained in effect until March 28, 1938, when this charge was
392 increased to $3.47. The next change appeared in Supplement 44 to Big Four ICC 8785, effective November 12, 1938, by which the reciprocal switching and delivery of livestock to the plant of Swift & Company from connections was discontinued. This did not affect the tariff as to the delivery of livestock which reached Cleveland by the line of Big Four or New York Central, lessee of the Big Four. This is now provided in New York Central tariff 20, ICC 499, which became effective September 15, 1943.

Thus it will be seen that throughout the period of April 21, 1904, to present date the Big Four or New York Central has provided by tariff for the delivery of livestock to the plant of Swift & Company, formerly known as People's Packing Company or the People's Provision Company, and it has only been since November 12, 1938, that the switching from connecting lines has been restricted. There has been no change in the facts concerning the buildings or tracks since the previous hearing in this case.

Q. Mr. Ford, I don't want the Examiner to be misled there; although the New York Central or its predecessor did not change its tariff so as to eliminate delivery of livestock to the plant of Swift & Company, it has refused to perform that switching, has it not?

A. That is a correct statement.

Q. Go ahead.

393 In this connection it is well to refer to certain rules of the present tariff. Rule 115 gives a definition of the term

Industrial Tracks and this definition is a track serving a particular industry, whether located upon the property of these companies or upon property owned or leased by the industry.

Rule 45 of the current traffic provides the following: Except as otherwise provided, the rates named in tariffs applying via these companies to or from points (stations) located thereon, will apply on traffic originating at, or destined to tracks of these companies within switching limits at points (stations) reached by their rails. Also to or from receiving or delivery tracks of connecting lines at such points (stations) when same are available under published switching tariffs at such points (stations), subject to the rules named herein.

The last page of this exhibit shows a list of the packing houses on the New York Central, lessee of the Big Four at Cleveland at the present time. There are ten such companies, only three of which do not bear the restricted note providing that reciprocal switching will not be provided. In other words, of the ten packing houses served by the New York Central at Cleveland, they provide by tariff that they will not accept connecting-line livestock and make delivery to seven of them. The three to which
394 they will make delivery are Cleveland Provision Company, Long Dressed Beef Company and Ohio Provision Company. In other words, the tariff provides that the carrier will make delivery of all livestock reaching Cleveland by this line to all ten of these industries including Swift & Company, but on traffic from other connections the New York Central will only make delivery to three of the companies, not including Swift & Company. This, of course, is not actually what is in effect because the New York Central is refusing to deliver any livestock to the plant of Swift & Company regardless of the line that brings it into Cleveland.

I have been over all of the tracks and pens referred to in this proceeding several times, the last time being yesterday.

Q. Now, refer to the last page, page 5 of Exhibit 10.

Mr. RYNDER. May we be off the record, please?

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. Back on the record.

Mr. RYNDER. Will you read the last question, please?

(Last question read by the reporter.)

Mr. RYNDER. I will delete the question, if I may. I think we are now in a position to stipulate that.

Of the companies named on page 5 of Exhibit 10, Federal Packing Company; Earl C. Gibbs, Incorporated; Koblenzer
395 Brothers; Kreinburg & Krasny; Standard Beef Company;

Swift & Company; Theurer Norton Provision Company, and Hughes Provision Company are all served by the same general track layout that serves Swift & Company, and by that I mean, to reach any or all of them the railroad has to cross the 1,619 feet of track owned by the stockyards. And that so far as the Lake Erie Provision Company are concerned, Long Dressed Beef Company and Ohio Provision Company, they have sidetrack connections with the main line of the New York Central, and in order to serve them, the New York Central does not have to cross the 1,619 feet of track owned by the stockyards company.

Mr. PIERCE. That is right.

Exam. HADEN. Before you go beyond that, you have Mr. Ryder's statement, and there being no objection, the statement of Mr. Rynder will be stipulated in the record.

Have you something further on this exhibit, Mr. Rynder?

Mr. RYNDER. I think not, and what is more, I believe that is all we have on direct. Of course, I might have something on rebuttal, but I would simply like to add that I, myself, made a diligent search, and I know Mr. Ford and the people in our office have, and we have been unable to find any agreement or memorandum of agreement or history of agreement by which the original sidetrack crossing from what you might call the stockyards
396 property across 65th Street to the plant of our predecessor, the People's Packing & Provision Company, was put in; how it was put in and on what date it was put in, or what the terms and conditions of the track arrangements were.

Exam. HADEN. Just a moment. I have some questions.

By Exam. HADEN:

Q. Mr. Ford, what does the designation of "grade" and "upper grade" in your exhibit mean?

A. That is merely the district of the carrier. The carriers designate the various districts in Cleveland. This district was originally known as "grade" and then changed to "upper grade," that particular area there.

Q. It denotes the industrial area?

A. It is an area on the New York Central; it has no other meaning.

Mr. RYNDER. In connection with that question, I might call the Examiner's attention to Exhibit 2, which is a photostatic copy of a certain tariff and shows how those terms are used.

A. Mr. Examiner, there is no difference between "grade" and "upper grade"; it is all the same thing. I merely changed the name from "grade" to "upper grade" on this certain date, and that was by the tariff effective June 15, 1924, as shown on page 3 of the exhibit.

By Exam. HADEN:

Q. It doesn't indicate that there was any change made in the method effecting delivery?

A. That's right, there was no change whatever.

397 Exam. HADEN. You may cross-examine.

Cross-examination by Mr. PIERCE:

Q. Mr. Ford, your statement was, as I recall, that the Big Four switched the People's Packing & Provision Company deliveries in 1904?

A. It was so provided by tariff.

Q. Do you know how a track led from the Big Four into that plant in 1904?

A. The only information we have is what is shown in these various blueprints that are attached to later agreements. The tariff provides that the People's Packing & Provision Company was an industry on the Big Four on April 23, 1904.

Q. My question was: Do you know in what way a track connected the People's Packing & Provision Company with the Big Four track in 1904?

A. I have no agreements to show that.

Q. Do you know if that was a team-track service that the People's Packing & Provision Company had in 1904?

A. The tariff does not indicate it was a team track. It indicates that——

Q. I am asking you what you know, or if you are basing your testimony entirely upon the provisions of the tariff.

A. As to 1904, entirely from what the tariff provides.

Q. Do you know what the basis was for the preparation of tariffs in 1904, 1905, and 1906, back in those days?

398 A. Yes, I do; from my own observation of the publication of tariffs of the Big Four and other railroads.

Q. Do I understand that you have no knowledge of a truck connecting with the Big Four Railroad serving the People's Packing & Provision Company in 1904 except that you infer from the publication in the tariff that the People's Packing & Provision Company was an industry on the Big Four Railroad at Cleveland and that side track was in there?

A. Yes, that is provided for by tariff.

Q. Have you or your company any information as to when the first connection was built to the People's Packing & Provision Company, the first track connection?

A. We were unable to locate that information.

Q. Were you with Swift & Company when Mr. A. R. Fay was traffic manager?

A. I was.

Q. Could you recognize his signature?

A. I think so.

Mr. PIERCE. I think at this point we might save time if we pass over this. I want to submit a stipulation to Mr. Rynder and give him an opportunity to look over a file, and then if we can't stipulate, I would like to pursue this phase later, if I may.

Exam. HADEN. You want a few minutes recess?

399 Mr. PIERCE. Not necessarily right now; if I may proceed with the rest of this and come back to it later——

Exam. HADEN. All right.

By Mr. PIERCE:

Q. Mr. Ford, did the People's Packing & Provision Company at any time receive any livestock in carload lots delivered to their plant?

A. After we took it over, of course we know what the operations were. After Swift & Company took over the company, livestock was delivered to the plant direct.

Q. When was the first—you say you know what took place after Swift & Company took it over—when was the first time that livestock, carload shipments of livestock were delivered by rail directly to the People's Packing Company's plant?

A. Well, that, of course, is something we couldn't determine because we couldn't locate any of their agreements as to when the track was put in. The track was there when we bought the property.

Q. Is not your latter statement and assumption that the track was there when Swift bought the property?

A. No; the tariff provides that it was an industry on the New York Central.

Exam. HADEN. Will you speak louder, please?

A. The tariff provides that it was an industry on the New York Central in the first place.

By Mr. PIERCE:

Q. But, do you know if it was in the location in 1904, if the People's Packing & Provision Company was in the same lo-
400 cation then as it is now, on West 63rd Street; I am asking you if you know?

A. The plant that we bought in 1905 was in the same location.

Q. I am asking you about the track.

A. Yes; the track was there too.

Q. How do you know that the track was there then?

A. Because our records at the office indicate that when we bought the plant, that there was a track serving that plant.

Q. Your records indicate that; is that the correct answer?

A. Yes.

Q. Do you have those records with you, Mr. Ford?

A. No; I didn't bring them. They are our general correspondence files.

Q. Well, your statement is now that the records of Swift & Company show that there was a track connected with the Big Four which served the People's Packing & Provision Company on West 63rd Street in 1904?

A. The general correspondence in our office indicates we were served by the Big Four, but as to the exact location of the track, I can't locate it.

Q. Then, is your answer that you don't know if this same track served the People's Packing & Provision Company in 1904, 1905, 1906, 1907, 1908, or 1909, covering that entire five years?

Mr. RYNDER. Will you read that question, please, Mr. Reporter?

(Last question read by the reporter.)

Mr. RYNDER. Don't take too much time on that, Mr.
401 Ford. Isn't it a fact that the records do not show any detail, the track number, or anything except that you had it?

WITNESS. That is true.

Mr. PIERCE. Whose question is being answered now?

Exam. HADEN. Can you answer that question?

WITNESS. No, I can't.

Mr. RYNDER. He is asking him if the same track served us. I don't know whether it is the same track moved over ten feet, or something like that. I know that I have been over these records and I don't want Mr. Ford to spend too much time on it.

Exam. HADEN. Can you rephrase your question to meet Mr. Rynder's objections?

Mr. PIERCE. Yes; I will try to.

By Mr. PIERCE:

Q. Isn't it a fact, Mr. Ford, that the tariffs in 1904 show the People's Provision Company, Clarke Avenue district?

A. That is correct.

Q. Your exhibit here does not refer to the Clarke Avenue district, does it?

A. That's right.

Q. And then wasn't that later changed, as far as the district is concerned, to read "District"?

A. As to those original tariffs, they were so sketchy, that was generally known as the Clarke District, but specifically
402 as to whether that 1904 tariff said, "Clarke district" I am not certain.

Q. Well, that is another question we will come back to. In the meantime, do you know if the People's Packing & Provision

Company or the People's Packing Company had any other business in 1904 in the Clarke Avenue district?

A. I don't.

Q. Are you conversant with the efforts that Swift & Company made to get a track built along West 63rd Street in a northerly direction and to cross West 63rd Street and to connect with the main track of the Big Four in 1907?

A. No; we couldn't locate a file on that.

Q. Do you have any knowledge of Swift & Company having been instrumental in getting an ordinance passed by the City of Cleveland to permit the Big Four to build this track across West 63rd Street in 1907 or 1908?

A. Our files are apparently lost or destroyed in connection with that.

Mr. RYNDER. I would like to call your attention, Mr. Ford, to the fact that Mr. Pierce is not asking about the street connection you testified about. I don't want you to be confused. He is talking about an additional sidetrack put in 63rd Street and you are talking about the original connection on 65th Street. Look at the map. I don't want you to be confused by counsel.

403 A. I have been talking about the track that served the plant proper, which is on the west side of 63rd Street, not the one on the east side of 63rd Street, which would require crossing of 63rd Street.

Mr. RYNDER. Get this clear, both for you and Mr. Examiner, the street intersecting between the——

Mr. PIERCE. If you will allow me to proceed——

Mr. RYNDER. I won't let you proceed with a street that has nothing to do with this. I will try to protect my witness.

Mr. PIERCE. If the witness will just listen to the question asked, he will have no trouble answering it. No one is trying to confuse him.

Exam. HADEN. Proceed, Mr. Pierce.

By Mr. PIERCE:

Q. My question, Mr. Ford, and we are referring to your Exhibit No. 1—my question referred to whether or not you were conversant with the activity and the undertaking by Swift & Company to a crossing over West 63rd Street up near the Big Four tracks, to get a connection direct with the Big Four and then come along the westerly side of West 63rd Street, in 1907. I am not referring to West 65th Street in any way. I am referring to the track that Swift & Company wanted along the westerly side of West 63rd Street extending northerly and crossing East 63rd Street, and connecting with the main track of the Big Four.

404 A. You mean that track was never put in?

Q. The effort that Swift & Company made to get a connection with the Big Four main tracks in 1907.

A. You are referring to a track that was never put in?

Q. I am referring to an effort made by Swift & Company to get an ordinance passed by the City of Cleveland and ask you if you know about that effort.

A. There was no—our files don't carry that information. There was no track established and there is none today from the north on 63rd Street into our plant.

Q. Mr. Ford, do you know that Swift & Company did procure an ordinance in 1908 to cross West 63rd Street with a track connecting to the Big Four main track in order to have a sidetrack built along the westerly side of West 63rd Street to serve the People's Packing & Provision Company's plant?

A. Coming from the north?

Q. Yes.

A. There was no track ever put in.

Q. I am not asking you about the track.

A. There was no track put in there.

Mr. PIERCE. May I ask you, Mr. Examiner, to have the witness discuss the ordinance and not the track.

Mr. RYNDER. If you don't know about the ordinance, say so.

WITNESS. I don't know anything about the ordinance.

405 We have no file on it. What I am trying to get clear—I don't want confusion in the Examiner's mind—about a track running north.

By Mr. PIERCE:

Q. I don't care about the confusion in the Examiner's mind. Will you kindly answer my questions? Would you say that Swift & Company did not obtain an ordinance in 1907 or 1908 for the Big Four to build a track across West 63rd Street immediately south of the Big Four main tracks so that they could get a connection?

A. I am unable to answer that question because I don't know.

Q. Would you say that they didn't do that?

A. I would say I don't know.

Q. Are you also conversant with the fact that Swift & Company in 1910 procured an ordinance from the City of Cleveland to build the present track across West 65th Street in order to serve the People's Packing & Provision Company's plant?

A. I don't know that Swift & Company secured such an ordinance, although I know there was a track built across there.

Q. Do you know when that track was built across there; I am asking you if you know?

A. I do not.

Q. Would you say that Swift & Company did not procure an ordinance to have the Big Four build a track across West 65th in order to serve the People's Packing & Provision Company which was then owned by Swift & Company?

406 A. I couldn't say whether they secured such an ordinance, because I don't know.

Q. Would you say whether or not Swift & Company furnished the right-of-way to the Big Four to build this connection into the People's Packing & Provision Company's plant, the right-of-way being furnished by Swift & Company beginning a short distance east of West 65th and extending in a northeasterly direction and thence along the west side of West 63rd Street, a sixteen-foot right-of-way to build that track?

A. There is an agreement dated March 19, 1908, between Henry C. Thom and the Big Four, by which a sixteen-foot strip of land running from lots 285 to 255, by which the Big Four was given an easement for the construction, operation, and maintenance of a railroad track across that property.

Mr. RYNDER. Just a minute.

By Mr. PIERCE:

Q. What lots are they; may I ask that first, Mr. Ford?

A. 285 to 255.

Q. 285 to 255?

A. Yes.

By Exam. HADEN:

Q. Can you describe the location of the lots on the map that is now in evidence? What do those lots compare with showing the way out of the Cleveland stockyard area, including the Swift plant?

A. That would be——

407 Q. What exhibit would that be?

A. (No answer.)

By Mr. RYNDER:

Q. What street do those lots abut on on which you gave the easement?

A. On 63rd Street.

Q. Not on 65th?

A. Not on 65th.

Mr. PIERCE. May I interrupt just a moment, Mr. Examiner? We have prepared a map here which we will offer in evidence.

By Mr. PIERCE:

Q. Do you have a map which shows the sublot numbers?

A. Yes, a small one.

Mr. PIERCE. Then, I will withdraw my interruption. I beg your pardon for interrupting you, Mr. Ford.

By Mr. RYNDER:

Q. Is that all to your answer?

A. It would be just at the point approximately where the two—where the one track becomes two tracks moving north along 63rd Street.

By Exam. HADEN:

Q. And those tracks you just referred to parallel the Swift plant?

A. Yes.

Q. Serving the Swift plant?

A. Yes.

By Mr. RYNDER:

408 Q. In order to reach that you would already have to have that track cross 65th Street.

Mr. PIERCE. Well, now, I am objecting at this time to Mr. Rynder taking over the examination, if you will pardon me.

By Mr. PIERCE:

Q. Mr. Ford, you say Sublots 285 to 255?

A. Yes.

Q. Sublot 285 is how far from the main tracks of the Big Four Railroad on the westerly side of West 63rd Street?

A. Well, I don't remember exactly, but it is not—in other words, 255 is the more distant.

Q. That is the more southerly lot?

A. Yes.

Q. And 285?

A. And 285 runs up toward the main line of the New York Central.

Q. This agreement you referred to was 1908, is that right?

A. That's right.

Q. Are you familiar with the appropriation proceeding which Swift & Company requested be filed to condemn part of the property of the Lake Erie Provision Company in order that this connection might be made with the Big Four main track at the northerly end of West 63rd Street in 1908?

A. I don't have any file on that.

Q. Now, isn't it also a fact that after 1908—may I refer you to your map here—after 1908 that Swift & Company

409 caused to be conveyed to the Big Four a right-of-way from your sublot 255 there extending in a southwesterly direction in order to get to West 65th Street?

A. There again our information is not clear.

Mr. RYNDER. What was the beginning of that question, please?

(Question read by the reporter.)

A. There is an agreement dated in October 27, 1910, between the Big Four and H. C. Thom, doing business under the name of the People's Packing Company, which states: "The second party desires a construction of sidetrack at West 63rd Street on the Cleveland division of the Big Four as shown in the blueprint;" but, I don't have the blueprint.

By Mr. PIERCE:

Q. Do you have a copy of that agreement between H. C. Thom and the Big Four, Mr. Ford?

A. Yes. "Said sidetrack to be connected with the Prim Street siding"—that is 63rd Street—"of the division aforesaid on the west side of there, extending northwardly about 258 feet, of which about 86 feet shall be on the land of the first party, the railroad, and about 172 feet on the land owned and controlled by the People's Packing Company."

By Mr. RYNDER:

Q. Now, before you leave that; that location of the lots itself would indicate that that grant was not necessary in order to get the track across 65th Street because the track was not to
410 be on 65th Street or crossing it at all.

A. Yes, sir.

Mr. PIERCE. I object to counsel interrupting here with questions of this kind. It seems to me that if I have the witness for cross-examination, I should be privileged to proceed with it.

Exam. HADEN. The objection is well taken, and I will ask you, Mr. Rynder, to please refrain from interrupting the cross-examination, unless it is for the purpose of clarification.

Mr. RYNDER. And I also submit I have the right to object to questions that are meant for the purpose of confusing the Examiner and the witness on locations and matters of that kind.

Exam. HADEN. That is understood.

Mr. RYNDER. Mr. Pierce has stated that, as if the grant there given had something to do with crossing 65th Street to our original plans, where obviously it does not.

Mr. FITZPATRICK. That might be your view, and we have a different view.

Mr. RYNDER. Well, if two honest minds can view a writing in different ways——

Mr. PIERCE. Mr. Examiner, if I may state here, if we didn't have reason to believe that our proof would show that our questions we are asking now could be proven, I wouldn't be
411 asking this witness questions.

Exam. HADEN. You may proceed.

By Mr. PIERCE:

Q. Mr. Ford, you spoke of an agreement of March 19, 1908. Who were the parties to that agreement, and do you have a copy of it, and if so, will you present it here?

A. That agreement was between H. C. Thom, and the Big Four Railroad.

Q. Now, that H. C. Thom is the same H. C. Thom who did business as the People's Packing Company?

A. That's right.

Q. And the People's Packing & Provision Company?

A. That's right.

Q. And he was an employee of Swift & Company, was he?

A. Well——

Mr. RYNDER. If you don't know, say so.

WITNESS. I don't know.

Mr. RYNDER. I think he was.

WITNESS. I think he was.

By Mr. PIERCE:

Q. Isn't he the same Thom that the Swift & Company bought the plant from in 1905?

A. Yes.

Q. Didn't he continue doing business as H. C. Thom, doing business as the People's Packing & Provision Company for a number of years after Swift & Company bought that business?

A. That appears from the agreement.

412 Q. Let us go back a moment, Mr. Ford, on this question of when first livestock came in, carload-lot shipments of livestock came into the present Swift & Company plant, if you can tell us?

Mr. RYNDER. If you can't, Mr. Ford, say so.

WITNESS. I can't.

By Mr. PIERCE:

Q. Was there any brought in prior to 1933?

A. Yes; there was.

Q. If you know then, when was it prior to 1933?

A. Well, for a considerable period of time prior to that time; I don't remember the exact facts.

Q. Was 1930 the first that any carload shipments of livestock was brought to the Swift & Company plant?

A. Well, my personal knowledge, I can't say how much prior to that.

Q. Do you know if there was any brought in prior to that?

A. Not of my own personal knowledge.

Q. Now, Mr. Ford, again, do any of the eight industries which were stipulated here as receiving service by means of the New

York Central traversing the stockyards track No. 10, did any of those eight packers or industries receive any carload shipments of livestock other than Swift & Company, over this track No. 10?

A. I couldn't say.

Exam. HADEN. Mr. Ford, I will have to ask you to
413 please speak louder; it is hard for me to hear you.

WITNESS. I couldn't say as to the other industries.

Mr. PIERCE. Mr. Rynder, could we see a copy of that agreement of March 19, 1908?

Mr. RYNDER. We can offer it before the hearing is over.

Mr. PIERCE. I may want to question this witness on this agreement; if he will be here at that time, all right.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record. Mr. Pierce, have we got your question answered on the record now, your last question, was it answered? Read the record, Mr. Reporter.

(Record read by the reporter.)

By Mr. PIERCE:

Q. Now, if I may get back to the agreement, did you refer to an agreement dated 1910, Mr. Ford; I didn't get the date?

A. Yes; the 27th of October 1910.

Q. Now, the agreement you referred to there is the agreement between the Big Four and Henry C. Thom, doing business under the firm name of the People's Packing Company of Cleveland, Ohio; is that correct?

A. That's right.

Q. And does that refer to the construction of a track along the westerly side of West 63rd Street?

414 A. It does.

Q. That agreement had a sixty-day terminating clause in it for both parties, did it?

A. As to usage of the track located on the land of the People's Packing Company.

Q. Will you tell me where that provision is?

A. Paragraph 7 reads as follows: "That the second party reserves the right to have removed at any time upon sixty days' notice in writing to the first party, so much of said track located on the land of second party, the ownership of which is vested in the first party, being the railroad."

Q. Now, doesn't paragraph 7 also provide that the railroad company could terminate that agreement on a sixty-day notice and remove its track?

Mr. RYNDER. The answer is "Yes," it does.

Mr. PIERCE. All right.

By Mr. PIERCE:

Q. Well, isn't that a fact, Mr. Ford, with reference to all of the sidetrack agreements which the Big Four made with Henry C. Thom, doing business as the People's Packing Company predecessor Swift & Company, and also the agreement made with the Federal Packing Company, predecessor of Swift & Company; isn't it a fact that all those had a sixty-day agreement permitting either party to terminate the contract in sixty days?

415 Mr. RYNDER. I will be glad to stipulate, without the witness looking for it, that so far as I know that is in every sidetrack agreement.

Exam. HADEN. You have the agreement with you?

Mr. RYNDER. Yes; he was asking whether that is not so in the other agreements. I will be glad to stipulate that so far as I know it is in every one, the sixty-day termination clause.

Exam. HADEN. When you make reference to all other agreements, that is very indefinite. We don't know what specific agreements you have reference to. I think for the time being we better confine the answer to the particular list to which Mr. Pierce is directing his question.

Mr. PIERCE. That is sidetrack agreements between H. C. Thom, doing business as People's Packing Company, predecessor to Swift & Company, and the Big Four; and the sidetrack agreement between the Federal Packing Company, predecessor of Swift & Company, and the Big Four.

By Mr. PIERCE:

Q. And also, while we are at it, if you know, in the sidetrack agreement with Swift & Company, which was dated November 25, 1916, was there not also a sixty-day terminating clause in that agreement for each party to exercise?

A. That is correct.

Q. The thing I reserved a moment ago was on the question of the tariffs. In your Exhibit No. 10, Mr. Ford, should not there be shown under the first two entries, April 23, 1904, People's

416 Provision Company and July 27, 1907, People's Packing Company; should there not be shown underneath the name of the industry there each time, "Clarke Avenue," the same as you have indicated, "Grade" under the industry and later entries there?

A. If you have the tariff I will be glad to look at it.

Q. Yes, sir.

A. In that tariff on page 11 appears the name of the ——

Q. Which one is that?

A. Tariff No. 415 ICC 2183.

Q. Yes, sir.

A. It provides under the heading of "Road," "Clarke Avenue" and under the heading of "District," "C. C. C. & St. L."

Q. And that is "Clarke," is it?

A. That's right.

Q. On the next entry there, on — or by the way, that entry refers to People's Provision Company?

A. That's right.

Q. And then on the next tariff, 3798, July 27, 1907.

A. This is tariff 47-A-ICC-3798; apparently my Exhibit should have "Tariff 47-A" on it instead of "Tariff 47."

By Exam. HADEN:

Q. You wish to correct your exhibit?

A. The second item opposite July 27, 1907, should be "Tariff 47-A, ICC 3798" instead of just "Tariff No. 47," and that provides the name of People's Packing Company, and under the heading of "Road," "C. C. C. & St. L." and under the heading of
417 "District," "Clark's Avenue."

Q. That is C-l-a-r-k-s?

A. Yes.

Exam. HADEN. Mr. Pierce, may I interrupt?

Mr. PIERCE. Yes.

By Exam. HADEN:

Q. "Clarks District"—now, that Clarks District is the same district to which you have just previously referred to as "Grade" and "Upper grade"?

A. Those were changed as they went through the tariffs.

Q. But the area is the same?

A. The area is the same.

Mr. PIERCE. At this time, if the Examiner please, I would like to submit to Mr. Rynder, a stipulation on the contents of our file referred to in the earlier part of the hearing. He may probably want to examine it and discuss it with the witness [indicating].

Exam. HADEN. Mr. Rynder, you may take a look at it while we recess here, or you may want to take the luncheon period to examine it, which might be quite lengthy.

We will recess for twenty minutes, gentlemen.

(Recess had.)

Exam. HADEN. All right, gentlemen, come to order, please.

Mr. RYNDER. Mr. Examiner, at the recess I have examined the file handed me by Mr. Pierce and also the document
418 headed "Stipulation," which purports to be a memorandum of some of the documents in that file. I think that the proposed stipulation fairly reflects what is shown by the document, and I am willing to have it put in here any way it is desired. If so desired, it can be copied in as a stipulation between the parties.

Exam. HADEN. Mr. Pierce.

Mr. PIERCE. That was our desire. We would like to make it an exhibit, if we may, and we would also like the privilege of having reproduced a map which accompanied one of the exhibits there, which I didn't want to remove from the file until all parties have seen it. We would like to reproduce this map and introduce it along with this stipulation. If this stipulation might be marked "Exhibit 11," Mr. Rynder, and then the map which we will reproduce and supply will be Exhibit 11-A.

Exam. HADEN. One moment, please. The stipulation will be marked for the purpose of identification as "Exhibit 11."

(Exhibit 11, marked for identification.)

Exam. HADEN. Now, will you state, Mr. Pierce, just what purports to be embraced within the document which you have offered as a stipulation?

Mr. PIERCE. Then 11-A will be a map.

Mr. FITZPATRICK. Off the record, please, Mr. Examiner.

Exam. HADEN. Off the record, please.

418A (Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. PIERCE. Well, this Exhibit No. 11 consists of four pages, which is a résumé and summary of the C. C. C. & St. L. Railway Company file No. 44540 entitled "People's Packing Company." The file was in the custody and control of Mr. J. E. Anderson, freight traffic manager of the New York Central at Cleveland, Ohio and contains various communications between Mr. A. R. Fay, traffic manager of Swift & Company, and traffic officers of the C. C. C. & St. L. Railway Company, beginning with September 14, 1907, and continuing to April 26, 1912.

Exam. HADEN. Contains seven pages in all; is that correct?

Mr. PIERCE. It will contain eight, Mr. Examiner, when Exhibit A is supplied.

Exam. HADEN. That will be a diagram of the track lay-out.

Mr. PIERCE. That will be a diagram of the track lay-out which accompanied the letter of Mr. A. R. Fay dated September 14, 1907.

Exam. HADEN. If there is no objection it will be received in evidence, there being no objection noted.

(Exhibit No. 11, received in evidence.)

Mr. PIERCE. Checking that, the stipulation is Exhibit 11

419 and the exhibit to be supplied is 11-A, and the three letters attached with be 11-B, 11-C, 11-D.

Exam. HADEN. Now, off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record. It will be understood that you will furnish this map, if you describe it sufficiently, it will be

understood that you will furnish it within ten days and will be considered as part of the stipulation.

Mr. PIERCE. In order to simplify it, I will see if we can't have it photostated immediately and save the rest of the exhibit.

As I understand, Mr. Rynder, you are going to let us have that agreement of March 9, 1908; I think that was the date?

Mr. RYNDER. Yes. Now, just following in connection with this stipulation, I think I ought to make this statement: That that file and memorandum of it, which apparently has not been preserved in our files, a[illegible] with which I was not acquainted until I saw today, would apparently indicate that the track connection which we have been talking about, which crosses 65th Street from the stockyards property to the Swift & Company plant, was put in in 1910 and not as our witness indicated, prior to 1905. To my mind that is the important fact indicated by the stipulation.

Exam. HADEN. Does that complete your statement, Mr. Rynder?

420 Mr. RYNDER. Yes.

Exam. HADEN. Mr. Ford, will you please take the stand, again?

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Ford, your livestock shipments are being received at the present time in what manner?

A. Through the stockyards company because of the change that was put into the New York Central tariff, that so far as the connecting line traffic is concerned, and because of the refusal of the New York Central Railroad to deliver traffic which reached Cleveland by their line.

Q. Was that a positive refusal? Or was it a qualified, or was it subject to a certain payment in addition to the line haul rate that delivery could be effected?

A. No; there was no condition under which they could be delivered.

Q. That was the only facility whereby you could receive your stock at the plant over the stockyards property; over the loading and unloading platform?

A. That's right.

Mr. RYNDER. Mr. Examiner, as I know, but you may not be perhaps familiar with the entire record, perhaps part of that question may be answered by Exhibits 4 and 5 at the previous hearing. I call your attention to Exhibit 5, which is a letter from the railroads to Swift & Company.

421 Exam. HADEN. Thank you.

By Exam. HADEN:

Q. Now, Mr. Ford, are you familiar with the developments within the past few months concerning the delivery of stock at the Cleveland Stock Yards?

A. Slightly.

Q. Do you know that it was proposed and Division 4 of the Commission authorized the Livestock Terminal Service to abandon the operation?

A. I understand they did.

Q. As of June 19th?

A. June 19th.

Q. Now, that suspension, however, has been postponed for a period of sixty days, as I understand, by the Livestock Terminal Service Company, postponing the cancellation date for sixty days beyond June 19th?

A. Yes, sir.

Q. Now, in the event that service was discontinued and no other provision was made for the loading and unloading of livestock at the Cleveland stockyards' loading and unloading facilities, do you know of any way that you can get stock into your plant?

A. No other facilities other than——

Mr. RYNDER. I take, you mean, by railroad?

Exam. HADEN. By railroad; yes.

A. No other facilities available. The Stock Yards Com-
422 pany is the only place.

By Exam. HADEN:

Q. It is your understanding then, that if this discontinuance did come about, that the only means by which the Swift & Company plant could obtain livestock would be through truck operations?

A. Or by rail to our own plant subject to these conditions which we mentioned.

By Mr. RYNDER:

Q. Well, you mean you could get it delivered by rail?

A. Yes; if we could get it delivered by rail to our plants, we have the pens.

Q. I am assuming that if the conditions of the stockyards do not change any and that continues and the Livestock Terminal Service Company went out of existence and no service was substituted at the loading and unloading docks of the Cleveland Union Stock Yards Company, there would be no way that Swift & Company could receive livestock by rail?

A. That's right.

Q. Do I understand that your investigation failed to disclose any agreement of any kind, either formal agreement or through

correspondence relating to any sidetrack agreement—when I say "sidetrack agreement," I mean a track of the Stock Yards Company that is necessary for the railroads to use in order to effect delivery at the Swift & Company plant?

A. None of the agreements that we have bear any refer-
423 ence to that.

Q. You are unable to find even a verbal agreement of any kind or oral agreement? It is your information, or does your information show that it was just come about by usage or custom?

A. When they established these tracks into our plant, they did hook onto the New York Central tracks and those New York Central tracks hooked onto the Stock Yards' tracks, and which in turn hooked onto the main track of the New York Central. In other words, you get off the New York Central line onto a Stock Yards Company track, and then onto a New York Central track, and then onto the Swift & Company's tracks.

Q. Now, my question related to an agreement of any kind relating to the use of that portion of the track that is used by the railroads that is owned by the Stock Yards Company?

A. There is nothing in any of our agreements referring to that.

Q. We might have this already in the record, but I want to be sure it is shown. What is the capacity of your unloading facilities at the plant, in cars?

A. Well, on that track that runs along the side of the building—there are two tracks there—you can set in, I would say, along our—through our property, buildings, and the land, I think you could set probably 15 cars on the two tracks.

Q. Well now, could you unload those 15 cars all at the same time, or would you have to pull four or five in and unload those, and pull in the other cars?

424 A. My inspection of the tracks yesterday indicated by using a movable platform alongside of the car that we probably could unload six cars at a time.

Q. Your plant facilities would permit unloading livestock in such quantities?

A. Yes. We have one chute in through the building, which is referred to on the—on one of the blueprints.

Q. Here is the record [indicating].

A. On Exhibit No. 1, which is a map, there is a location marked as a "Y," and it is just about that location where there is a chute through our plant into pens that are marked about where the "X" is shown on that exhibit. There are ten pens in that area marked by the "X" capable of holding eight carloads of livestock. Now, all of the track from the "Y" south, practically to 65th Street, is available for unloading.

Q. And you do have facilities to unload at a single placing of approximately fifteen carloads of livestock?

A. No, no; because that contemplates two tracks. There are two tracks along this side of the plant and that placement of that many cars would be by the use of both tracks; the inner track I judge would hold about six cars.

Q. That would be the track from which you would unload livestock into the plant?

A. That is correct.

Q. You have track facilities for fifteen cars, but unloading
425 facilities for unloading six at one time?

A. Yes.

By Mr. RYNDER:

Q. That is, six livestock cars?

A. Six livestock cars.

Exam. HADEN. Are there any further questions of Mr. Ford at this time? He will be recalled later on in the proceeding.

Mr. PIERCE. I would like to ask him two or three questions, if I might.

Exam. HADEN. You may.

Cross-examination (resumed) by Mr. PIERCE:

Q. Mr. Ford, is it a fact that the only door into your plant along the westerly side of West 63rd through which livestock are unloaded from livestock cars and could now be unloaded from livestock cars, is that door along which side there is the figure 7?

A. That is not exactly correct. The fact is that the livestock that was in the past unloaded are unloaded through the one door referred to in my statement to the Examiner.

Q. That is the door marked No. 7?

A. "Y," on that exhibit we were looking at.

Q. I mean on the building. If you remember what it was marked there?

Mr. RYNDER. It does not show here.

By Mr. PIERCE:

426 Q. And then, when the stock was unloaded into that one door, then it was driven through this building toward the west, toward West 65th Street; is that correct?

A. In the direction of West 65th Street, to the pens.

Q. To the pens which are located over joining the easterly side of West 65th Street; is that correct?

A. Yes.

Q. How far is it from the car door where the livestock would enter this building, over to where the entrance—did you say, eight pens you have there?

A. Ten pens.

Q. How far is it from the car door where the livestock would be unloaded over to the entrance to these ten pens?

Mr. RYNDER. This blueprint did not show; it doesn't even show the pens. This blueprint you handed me does not——

A. I would say probably 150 feet.

Mr. RYNDER. Mr. Ford, give your best judgment on it, and if you can't, say you can't.

Mr. PIERCE. Mr. Rynder, if I might ask, is there any reason why we couldn't know the dimension of those pens, and the location of them?

Mr. RYNDER. Not at all; we simply didn't get it. There is no secret about it.

Mr. PIERCE. Is it all right if our engineers went over and made the measurements?

Mr. RYNDER. Absolutely.

427 Mr. PIERCE. May we do that, and that would dispose of the assumption about the pens.

Mr. RYNDER. We didn't know that the question would be asked.

Exam. HADEN. And the witness, I understand, is not in a position to state?

WITNESS. I don't know the dimensions.

Mr. PIERCE. May we stipulate what the particular dimensions about the area of the pens and within the Swift & Company's plants and the location of those pens will be as provided by the engineering department of the New York Central, if they will be permitted to go on the premises, and we will file it?

Mr. RYNDER. They will be permitted to go there and their returns will be correct. I would simply like to call the Examiner's attention to the fact that the approximate location of those pens have been identified and Mr. Ford says it is ten pens and capable, as he understands it, of holding eight cars.

Exam. HADEN. I don't want any statement submitted after the close of the hearing to which there would be a difference of opinion as to the correct measurements.

Mr. RYNDER. I won't quarrel with any engineer who measures them, as to the size.

WITNESS. I don't know the measurements, your Honor. We didn't measure them at all. From our observation and

428 actual experience, there are facilities for eight carloads of livestock, ten pens.

Exam. HADEN. Couldn't it be determined before we convene this afternoon so as to eliminate the necessity of supplementing additional documents to which there might be a difference of opinion as to the exact dimensions?

Mr. PIERCE. I have a party here from the engineering department, and maybe we can get that information.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. PIERCE. We will have to make inquiry and see what can be done, Mr. Examiner. They are working short handed in the engineering department. Suppose we make an inquiry during the noon hour?

Exam. HADEN. All right.

Mr. PIERCE. I have a couple of other questions, Mr. Examiner, if I may ask the witness.

Exam. HADEN. Proceed.

By Mr. PIERCE:

Q. Mr. Ford, when you say that six cars could be placed at this one door at one time——

A. Not at the one door.

Q. How would you place them in order to unload them?

A. Along the tracks there using movable chutes for unloading as is the general practice in a lot of stations throughout the
429 country.

Q. Now, Mr. Ford, referring to Exhibit 1, which is a map showing the location of Swift & Company's sidetrack along the westerly side of West 63rd Street at the point "Y" is a location "A" where the door is located in the Swift & Company building through which livestock was unloaded from railroad cars?

A. That is correct.

Q. And where one car at a time had to be placed to unload it; is that correct?

A. Yes.

Q. The building next south to that is your cooler or refrigerator building?

A. It is another building; I don't know what it is.

Q. There is no place to put a portable platform along south of this doorway marked "Y" to enable you to unload a car more than one at a time?

A. Immediately south of that space is—which runs completely through our property to 65th Street——

Q. I am talking about the building next south to the point marked "Y"; isn't that your cooler or refrigerator building?

A. It is a building into which we couldn't drive livestock.

Q. You couldn't drive livestock, and also you couldn't use a portable chute along that?

A. That is true.

Q. Isn't that same thing true with reference to the build-
430 ing alongside of the track north of the point "Y"?

A. Yes.

Q. The building is built close up to the track?

A. Yes; the only place for unloading livestock into buildings is the one location we have referred to.

Q. Then today, wouldn't you have to place one car at the door and unload it, and then move up and place another car at that door and unload that in order to unload your livestock?

A. We would if we didn't take deliveries at points further south of that last building.

Q. When you refer to points further south, you are referring to what would be a new enterprise or development or putting in facilities at points south of the building?

A. Merely putting up a movable chute.

Q. There are no facilities there at this time?

A. No.

Q. You have cold storage there?

A. On part of it.

Q. What is on the other part of it?

A. There are barrels on another part; the balance is vacant.

Q. It has never been in the past equipped for receiving livestock cars from the railroad?

A. Not for that purpose.

By Mr. FITZPATRICK:

Q. There are no pens there for holding the stock?

431 A. The stock, if unloaded from these tracks, would be driven across the vacant lot of ours into the pens which are referred to previously.

Q. But, do you have—

A. These ten pens.

Q. Pardon me; do you have border lanes that would serve as alleys for the stock?

A. We do not.

By Mr. PIERCE:

Q. Mr. Ford, the stock pens you have referred to as numbering ten, are they the same pens in which your truck stock is unloaded into and stored?

A. They are.

Q. They are the same pens?

A. Yes.

Q. Then, the condition of your storage pens inside the Swift & Company's plant is the same at this time as it was at the time of the hearing in 1942 and for some prior to that?

A. Yes.

Q. Now, with reference to the Cleveland Union Stock Yards Company, do you know if any officers of Swift & Company were directors of the Cleveland Union Stock Yards Company?

A. I do not.

Q. Do you know if any officer of your company was a member of the Executive Committee of the Cleveland Union Stock Yards Company?

A. I do not.

432 Q. Are you familiar with the ownership of stock of the Cleveland Union Stock Yards Company by Swift & Company up until 1936?

A. I have no knowledge of it.

Q. Do you know anything about a so-called Traffic Committee that was formed for the purpose of expediting traffic in the stockyards district and harmonizing operations, and promoting the general welfare of the district?

A. No.

Q. You don't know of an officer of Swift & Company that was ever a member of the Traffic Committee?

A. I do not.

Mr. PIERCE. I think that is all.

Exam. HADEN. Mr. Fitzpatrick.

By Mr. FITZPATRICK:

Q. Mr. Ford, you were asked by the Examiner a question as to the possibility of receiving stock in case you could not use your own track and in case there was no service by the Livestock Terminal Service Company or some other company at the stockyards. Wouldn't it be possible, as a matter of fact, to receive stock on team tracks from the railroads and truck the stock to your plant?

A. I don't know of any such facilities.

Q. Well, don't you know all the railroads here in Cleveland have team tracks?

A. I assume they do, but I didn't know they had any livestock unloading facilities at those team tracks, particularly any chutes for unloading livestock.

433 Q. But, in making your answer, you didn't give any thought at all to the possibility of receiving stock at public team tracks?

A. The connecting line carriers have never offered any stock except through the stockyards, particularly since this change was made in the tariff.

Mr. FITZPATRICK. That is all.

Exam. HADEN. Any further questions at this time of Mr. Ford? Mr. Ford will be recalled later on.

Mr. PIERCE. I have a couple, but I will reserve them.

Exam. HADEN. You can go along now.

By Mr. PIERCE:

Q. If a car of livestock was placed at this door at your plant where formerly livestock from cars was unloaded, wouldn't that block your other truck traffic that comes in that particular door?

A. It would not block any truck traffic.

Q. Isn't there a driveway built across there from West 65th Street where trucks back up and use that door?

A. Trucks can back up to take traffic.

Q. Isn't that doorway's principal interest of entrance and ingress in and to the plant for truck deliveries?

A. No.

Q. I mean all supplies other than livestock?

A. The principal—is through the garage facility of what was formerly known as the Federal Packing Company and the
434 old Swift Company property. In other words, that space between the two plants has been covered over with a garage roof, and that is the principal truck dock.

Q. What is this doorway used for generally, the one you say was used for unloading livestock?

A. Well, it is used for unloading—had some hay through that door, which is for general purposes, but generally not used for any products that are generally known as packing house products, fresh meats, and so forth.

Mr. RYNDER. May we be off the record, please?

Exam. HADEN. Off the record.

(Discussion had outside the record.)

Exam. HADEN. On the record. We will recess until two o'clock.

(Hearing recessed at 12:20 p. m. to 2:00 p. m.)

AFTERNOON SESSION

Exam. HADEN. Come to order, please, gentlemen. Mr. Rynder.

Mr. RYNDER. Before the next witness goes on, there is a matter I thought perhaps we could settle now. Since we were having this hearing, our engineer has gone out to the plant and made a rough sketch of the pens shown, the areas, the dimensions, and the size of each pen. We could have that either made up
435 into a respectable blueprint filed within ten days, or the engineer or one of the railroad's engineers might want to consult with our engineer before we do that.

Mr. PIERCE. I did call our engineering department, and I believe that we can agree upon what the area and the location is.

Mr. RYNDER. All I want you to agree is to have it put in after the hearing.

Mr. PIERCE. That is all right; we can agree on that. If we agree on the blueprint which is filed, is that all right?

Exam. HADEN. Yes. Now, have you decided that you will put that in later?

Mr. PIERCE. We will agree on the blueprint; our engineers are on the way over now and will come in later in the afternoon.

Exam. HADEN. If you want to hold that until later this afternoon——

Mr. PIERCE. All right; we might agree on it later on.

Exam. HADEN. Mr. Rynder, just before our noon recess, Exhibit 10 was marked for identification, and if there is no objection, the Exhibit 10 will be received in evidence.

Mr. RYNDER. Thank you.

Mr. PIERCE. No. 10 was what?

Exam. HADEN. Mr. Rynder's tariff exhibit.

Mr. PIERCE. Oh, yes.

436 (Exhibit No. 10, Witness Ford, received in evidence.)

Exam. HADEN. Mr. Rynder, do you have any further witnesses?

Mr. RYNDER. Not on direct, but I may have some on rebuttal.

Exam. HADEN. Mr. Pierce, are you ready to proceed?

Mr. PIERCE. Yes, sir; we would like to call Mr. Pastor.

A. B. PASTOR was sworn and testified as follows:

Direct examination by Exam. HADEN:

Q. Give your full name and position.

A. My name is A. B. Pastor. I am assistant engineer on the New York Central.

By Mr. PIERCE:

Q. Mr. Pastor, are you conversant or familiar with the stockyards and facts at the stockyards over the past, say, ten years; have you been in there more or less?

A. I believe I am.

Q. Have you in connection with your work done or had prepared under your supervision or cooperation, the blueprint which I now hand you, and which we will mark for identification as——

Exam. HADEN. Exhibit 12, which has on it "Real Estate transfers" in the lower right hand corner.

Mr. PIERCE. That is the title of the matter. We used this

437 map to indicate the sections of the track, so, it isn't in here. for the purpose of indicating real estate transfers.

(Exhibit No. 12, Witness Pastor, marked for identification.)

By Mr. PIERCE:

Q. Will you indicate where on Exhibit 12 the Big Four Railroad tracks are?

A. The Big Four Railroad tracks extend on the upper part of the map, the one to Cleveland on the right.

Q. Now, will you indicate the route that the track takes and where the track is shown on this blueprint which diverges from the Big Four main tracks and goes on to the property of the stockyards on the westerly side of West 65th Street?

A. The point "A" beginning of this side track serving the Union Stock Yards and these other plants. It goes down from A, B, various letters C, D, and E, and then it switches back coming back from D, F, G, H, and so forth into the plant of the Swift & Company.

Q. Now, will you tell us: Section A, B, is what part of the track?

A. Section A, B, is part of the track owned by the Big Four Railroad.

Q. Section B, C?

A. That is owned by the Cleveland Union Stock Yards.

Q. And then will you go ahead and delineate from Section C on to the left, the south and west, just what sections, what tracks are there?

438 A. The C–3 is owned by the Cleveland Union Stock Yards Company. From C–3——

Q. You are speaking now of land on which the track is located; is that right?

A. I was speaking of the track itself.

Q. You were speaking of the track itself. All right.

A. Would you like to have it divided as to the land?

Q. We will do that after you indicate the stockyards area there.

A. From C–3 westward to E is owned by the railroad company.

Q. The track is owned by the railroad company?

A. The track is owned by the railroad company. Starting at point D coming eastward from point D, F, G, H, J, K, L, M, to point W is all owned by the railroad company except the portion approximately fifty feet shown green there, which I believe is owned by the Swift and Company.

By Exam. HADEN:

Q. You believe; do you know whether it is owned by Swift & Company?

A. Yes; it is owned by Swift & Company.

By Mr. PIERCE:

Q. Now, Mr. Pastor, beginning again at point C which is just west of West 65th or Gordon Street——

A. Gordon Street?

Q. Gordon Street, from point C to C–1, what is the name of the property owner adjoining that track?

A. The property owner shown on this plan is the Standard Beef Company.

439 Q. From C–1 to C–2, the ten foot strip.

A. It is a ten-foot strip reserved and owned by the Union Stock Yards.

Q. From C–2 to C–3, what is the name of the industry?

A. The name of the industry there is Kreinburg & Krasny.

Q. Then, from point C–3 to D, will you tell us what section of the track that is?

A. That is the portion of the track owned by the railroad on the property of Kreinburg & Krasny.

Q. Now, in order to get from the Big Four main tracks to Swift & Company's plant on West 63rd Street, where do the switching movements have to go in order to get back over there?

A. Switching movements would have to start at point A which leaves the main line; proceeds to point D and past the point with sufficient room to switch back from 65th Street to 63rd Street.

Q. Does this show the track lay-outs, sir, as they exist now?

A. Yes.

Q. As they have existed for some time?

A. As they have existed for some time.

Q. Now would you explain for the record, please, what the track is from point L along West 63rd Street, the westerly side of West 63rd Street?

A. From point L along the westerly side of 63rd Street there are two tracks. The westerly track is the one adjacent to
440 the Swift & Company buildings and the easterly track is the second track that passes down past their plant.

Q. And extends north to what other plant?

A. Extends north to the Theurer Norton Provision Company and I believe two other packing concerns served from that track.

Q. Those concerns are what?

A. The Hughes Provision Company and Koblenzer; I believe that is Provision Company or Koblenzer Company.

Q. You have just referred to the tracks along the westerly side of West 63rd Street and they extend from point L to what points on this map?

A. From point L to points W, X, P, and Y. I would like to take that letter P out of there; that is the end of the right-of-way.

By Exam. Haden:

Q. You want the P out; that is at the end of the ——

A. At the end of the eastern—I mistook it myself.

By Mr. Pierce:

Q. Will you describe what the section of the track is, beginning at J crossing Prim Street?

A. From J, T there is a portion of the track owned by the railroad company crossing Prim Street; on the easterly side of the

street serves two tracks owned by Swift & Company extending from T to V for the easterly track, and from T to the property line shown on the westerly track. The westerly track continues to serve Theurer Norton Provision Company to point U.

Q. Now, for ready reference, Mr. Pastor, is there a
441 legend on this blueprint which shows the sections of the track, by whom they are owned, and on whose property the tracks are located?

A. Yes, sir; the legend on the right hand end of the plan.

Mr. PIERCE. We would like to offer this exhibit in evidence at this time [indicating].

Mr. RYNDER. No objection.

Exam. HADEN. If there is no objection, it will be received as marked "Exhibit 12."

(Exhibit No. 12, Witness Pastor, received in evidence.)

By Mr. PIERCE:

Q. Now, Mr. Pastor, I hand you what we will have marked for identification as "Exhibit 13" [indicating].

(Exhibit No. 13, Witness Pastor, marked for identification.)

By Mr. PIERCE:

Q. This map being marked in the lower right hand corner, "Revised June 21, 1944, tracks serving Cleveland Union Stock Yards Company," and ask you if you are familiar with and have knowledge of the tracks and the designation of the tracks as shown by that plan?

A. Yes, sir.

Q. Was this plan prepared by you or did you cooperate in the preparation of it and have some connection with the supervision of it?

A. Yes, sir.

Q. This map shows now—well you tell us briefly what it shows as set forth in the legend on the map?

442 A. Tracks owned and maintained by the railroad company are shown by red. Tracks owned by the Cleveland Union Stock Yards Company and maintained by New York Central Railroad at railroad expense are shown by red and yellow. This information is shown on the key on the right-hand portion of the map. And tracks owned by other industries and maintained at industry's expense is shown by the solid yellow line.

Mr. PIERCE. We would like to offer this Exhibit 13 in evidence.

Mr. RYNDER. No objection.

Exam. HADEN. If there is no objection it will be received in evidence as Exhibit 13.

(Exhibit No. 13, Witness Pastor, received in evidence.)

By Mr. PIERCE:

Q. Mr. Pastor, have you had occasion to make an investigation and inquiry into the history of some of the tracks at the Cleveland Union Stock Yards which are shown on Exhibits 12 and 13?

A. Yes.

Q. In your investigation did you ascertain when the track from F to G on Exhibit 12 was built across West 65th Street?

A. Well, from the files I would say it was built sometime in September or October of 1910.

Q. And on what do you base that statement?

A. My statement is based on letters from the engineer of maintenance-of-way to the superintendent of the Big Four stat-
443 ing that the track was under construction at that time.

Estimates showing its costs, and correspondence relating to an agreement to cover its cost and reference to agreement covering the use of the track.

Q. And the estimate of the cost, which you say was made in 1910, at which time the file indicates that the track was being built, will you state just what track was indicated in that estimate, indicating on Exhibit 12?

A. D, F, G, H, J, K, L, O, M, X, and L, W.

Exam. HADEN. Will you read that answer, please?

(Last answer read by the reporter.)

By Exam. HADEN:

Q. Well now, the portion of the track that is used, included in your statement, Mr. Pastor, does not that include a short strip of track which you say is owned by Swift & Comnay at the end?

A. I can't say; I think that portion shown in green, ending at letter W, was constructed some time later than that; I am not sure.

Q. And wasn't included in the plan which you have recited?

A. I don't think it was; there have been several minor track changes made there from the original proposal, of course.

Exam. HADEN. That is all.

Mr. PIERCE. That is all.

Mr. RYNDER. No questions.

Exam. HADEN. Just one moment, Mr. Pastor. Off the
444 record, please.

(Discussion had outside the record.)

By Exam. HADEN:

Q. Well now, Mr. Pastor, the portion of the track which is shown on your map as being owned and operated by the New York Central, beginning with that portion marked "G" and going on down to N, is that track built on the railroad right-of-way, or is that over Swift & Company's line?

A. I believe that is all railroad right-of-way; that is the easement.

Q. Where does Swift & Company's property begin which is designated on your map, "26," if you know? If you don't know, I can get Mr. Rynder——

Mr. PIERCE. Mr. Cobbe can explain that. He is the next witness.

Exam. HADEN. All right. Are there any further questions of Mr. Pastor? (No response.)

If not, you may be excused. Thank you, sir. (Witness excused.)

Mr. PIERCE. I will call Mr. Cobbe.

RICHARD C. COBBE was sworn and testified as follows:

Direct examination by Exam. HADEN:

445 Q. Give your full name, please, and your occupation, to the reporter.

A. Richard C. Cobbe, Land and Tax Agent of the New York Central Railroad, with headquarters at Cleveland.

By Mr. PIERCE:

Q. How long have you been with the New York Central, Mr. Cobbe?

A. 28 years.

Q. Did you have occasion to make an investigation and inquiry concerning lands, title to lands, and other proceedings in connection with the property and tracks at the Cleveland Union Stock Yards and Swift & Company's plant in that area?

A. Yes.

Q. Did you make a trip to Cincinnati and Springfield to see if you could locate all the plans and correspondence that might be available, of the Big Four?

A. Yes.

Q. What further investigation did you make?

A. As to the files you mean?

Q. Yes; any data on these tracks?

A. Well, that just about constitutes my search; it was most entirely a file search through the different departments which took me to Cincinnati and also with some correspondence with the Chicago office.

Q. And after corresponding with the Chicago office, were you able to locate any further files?

A. Well, I found that the traffic department files which
446 were in Chicago for the period of 1908 to 1910 had been removed to Cleveland, and I later found that file in the local traffic manager's office.

Q. And that file was under the heading of the People's Packing Company?

A. Yes, sir.

Q. Now, Mr. Cobbe, have you at times earlier than the last two weeks, had occasion to go into land matters in and near the stockyards and that area out there for the railroad?

A. I had an occasion, yes, in a period of years.

Q. In your investigation did you look up and locate an ordinance No. 10944 passed by the City of Cleveland on May 25, 1908, in connection with a track to be built or proposed to be built across West 63rd Street immediately south of the Big Four tracks?

A. I did.

Q. Do you have a copy of that ordinance?

A. There is one available.

Mr. PIERCE. We have this exhibit here, which will be Exhibit No. ——

Exam. HADEN. No. 14 for identification.

(Exhibit No. 14, Witness Cobbe, marked for identification.)

By Mr. PIERCE:

Q. We will hand you what has been marked for the purpose of identification as "Exhibit 14" and I will ask you to state if that is the ordinance which you ascertained from the records of
447 the City of Cleveland which was passed in—what was that date—May 25, 1908.

A. That is not the paper [indicating].

Q. And will you state——

Mr. RYNDER. He said "that is not the paper."

A. 10944.

By Mr. PIERCE:

Q. I hand you what we will—leave that temporarily and have copies made. I will mark it for identification as "Exhibit No. 14."

Exam. HADEN. You have no copy to go into the record at this time?

Mr. PIERCE. We haven't the copies to go into the record, apparently.

Exam. HADEN. When will you have it, Mr. Pierce?

Mr. RYNDER. I am agreeable to have counsel send it in later and have it marked then.

Mr. PIERCE. All right.

Mr. RYNDER. But could I see it now?

Exam. HADEN. Surely. Off the record, please.

(Discussion had off the record.)

Exam. HADEN. On the record.

By Mr. PIERCE:

Q. Now, Mr. Cobbe, will you state just where the crossing of West 63rd Street with this track was supposed to be made under this ordinance 10944 of April 25, 1908.

A. The ordinance, as designated, referred to the red line as shown on the map as the location for the track.

448 Q. That red line extends from where on the north to what point on the south?

A. That extends from a connection with the Big Four Railway at the easterly boundary of West 63rd Street, formerly Prim Street, to a point of intersection with the westerly boundary of West 63rd Street at about lots 279 and 280, the dividing line between those two lines.

Q. That is on the westerly side of West 63rd Street?

A. Westerly side of West 63rd Street.

Q. Now, did you also find a court record of a restraining order granted to the Lake Erie Provision Company on or about June 5, 1908, and if so, will you state what that court record shows with reference to this restraining order?

A. The Lake Erie Provision Company who were the owners of the land on either side of West 63rd Street at its junction with the south line of the Big Four Railway filed an action in Common Pleas Court of Cuyahoga County under date of June 5, 1908, against the Big Four Railway, and obtained a temporary restraining order which was later made permanent, restraining the railroad company from constructing this track according to the ordinance.

Q. Now, following that, Mr. Cobbe, what was the proceeding you found with reference to appropriations filed in Insolvency Courts and appealed to the Common Pleas Court in connection with the Lake Erie Provision Company's land at or near the

449 point where this proposed crossing of West 63rd Street by the track would be constructed?

A. The condemnation proceedings were later filed by the Big Four Railway and tried in Insolvency Court of Cuyahoga County, but in the May 1909 term the Railway Company was granted a petition to condemn some part of the Lake Erie Provision Company's land and a verdict of $13,500 was awarded the Lake Erie Provision Company, which both parties appealed.

Q. And you know the date that both parties, that is, the railroads, and the Lake Erie Provision Company appealed that appropriation proceeding?

A. I have that date here [indicating].

Mr. PIERCE. Well, I have obtained it from the record. The railroads appealed on October 21, 1909, and the Lake Erie Provision Company appealed it on October 20, 1909. Is that agreeable to you, Mr. Rynder, if I stated it?

Mr. RYNDER. Yes; and if you want to state the rest of it, it is okay.

Mr. PIERCE. Well, all right, we might simplify it. On September 6, 1910 ordinance No. 18748 was procured by Swift & Company for the crossing of West 65th Street for the track leading from the west side of West 65th Street to the property of the People's Packing Company located along the westerly side of West 63rd Street and in connection with that ordinance there were certain transfers of right-of-way conveyed
450 to the Big Four Railroad and I will have to ask Mr. Cobbe to recite that for you.

By Mr. PIERCE:

Q. Will you indicate on Exhibit No. 12, Mr. Cobbe, just what right-of-ways were transferred here or caused to be transferred by Swift & Company to the railroad company in 1910?

A. Swift & Company's conveyance was from Henry C. Thom, dated June 7, 1911, across lots 164, 165, 151, 152, 153, and 154.

Q. Now, the portion of the track leading to the present Swift & Company's plant as shown on Exhibit No. 12 is indicated by what color across these sublots which you just named?

A. Shown in green.

Q. Now, can you state where the right-of-way was procured for the track immediately east of West 65th Street?

A. The right-of-way across Lot 166 was secured from the Cleveland Union Stock Yards Company under date of May 11, 1911, shown in yellow on the map.

Q. Now, will you state, please, when the right-of-way was obtained and am I stating it correctly that it is a sixteen-foot right-of-way?

A. Sixteen-foot right-of-way.

Q. Beginning at sublot 255 along the westerly side of West 63rd Street and extending north to lot 285, will you state when that was obtained, and by what means of conveyance?

A. That right-of-way was obtained by two easements;
451 one from the Theurer Norton and others under date of March 18, 1908, and the other from Henry C. Thom, et al., under date of March 19, 1908, for conveying whatever rights they had in the sixteen-foot right-of-way across lots 255 to 285 on the westerly side of West 63rd Street.

Q. Now, Mr. Cobbe, did you also find a proceeding which had been had in Common Pleas Court between the Cleveland Union Stock Yards Company and the Cleveland Provision Company?

A. I did.

Q. Will you state if you found any connection with that proceeding that a deed had been given by the Cleveland Union Stock Yards Company to the Cleveland Provision Company on July 14, 1916?

A. It had.

Q. And in addition to seven and three-quarters acres of land which the Cleveland Union Stock Yards Company conveyed to the Cleveland Provision Company at that time, what if anything did that deed provide with reference to a right-of-way of the Cleveland Provision Company to the Big Four?

A. That deed provided in addition to the conveyance of the seven and three-quarters acres, that sixteen-foot right-of-way to be later described and conveyed extending from the Cleveland Provision Company property to a connection with the Big Four Railway, the location at that time being indefinite.

452 Q. Now, the property referred to then as the Cleveland Provision Company is indicated on Exhibit 12 now as the property of what company?

A. Earl C. Gibbs.

Q. At the time that the deed was given by the Stock Yards Company to the Cleveland Provision Company, July 14, 1916, did you also find in the Common Pleas Court record Case No. 444,923, and Cuyahoga County, Court of Appeals Case No. 15727, a copy of an agreement made between the Cleveland Union Stock Yards Company and the Cleveland Provision Company dated July 14, 1916?

A. An agreement of sale; yes.

Q. Agreement of sale. Do you have copies of those with you, Mr. Cobbe?

A. No; I have not.

Q. Now, in this Common Pleas Court action which was filed by the Cleveland Union Stock Yards Company on May 13, 1936, did your examination of the records show that that action was appealed to the Court of Appeals?

A. Yes.

Q. Will you state please just what the proceedings in that case involved, Mr. Cobbe?

A. In 1935 or 1936, the Cleveland Provision Company went through bankruptcy and at that time the Cleveland Trust Company took steps to clear the cloud which was then existing on the land. By means of this agreement to sell a deed——

453 Q. You said the Cleveland Trust Company?

A. The Cleveland Provision Company.

Q. You said Cleveland Trust.

A. I meant the Cleveland Provision Company went into bankruptcy and the Cleveland Union Stock Yards filed a suit to clear up this cloud on the title due to the fact that they had issued a deed and agreement to convey a sixteen-foot strip.

Q. Well, go ahead and relate what happened in that action as the record indicated when you read it; will you please, Mr. Cobe?

A. Well, this—the petition of the Cleveland Union Stock Yards Company was dismissed and they appealed the dismissal and the appeal—the verdict on the appeal was also dismissed, and the Cleveland Union Stock Yards Company were ordered to prepare a deed and convey the sixteen-foot strip of land to Irving Kane, trustee, in the Cleveland Provision Company bankruptcy case.

Q. When you speak of "bankruptcy," you refer to Section 77-B proceedings?

A. 77-B.

Q. Now, I hand you what is entitled here "Grant of right-of-way," and ask you if that is the deed—I am coming back to this for identification in a moment—if that is a copy of the deed which the Cleveland Union Stock Yards gave to the Cleveland
454 Provision Company in connection with the litigation in 1936 in Common Pleas Court and Court of Appeals, which we have just been discussing [indicating]?

A. It is.

Q. And did you find that deed recorded in the records of Cuyahoga County?

A. Yes, sir. It is recorded in Volume 4666, page 610.

Q. What is the date of that deed, please?

A. November 24, 1936.

Q. Did you also find the deed, Trustee's deed given by Irving Kane in connection with this Cleveland, former Cleveland Provision Company property and the right-of-way which you just referred to?

A. I did.

Q. Will you tell us the date on which the Trustee's deed was recorded, the date of the deed, and that date it was recorded, if you have it?

A. The date of the deed is February 16, 1937, and the recording data is Volume 4701, page 129.

Q. In connection with the deed dated November 24, 1936, from the stockyards to Irving Kane, trustee, will you state what right-of-way was conveyed in that deed to the trustee by the Stock Yards Company and the route that right-of-way takes on Exhibit No. 12, the route it follows?

A. Did you want me to read the description, or just follow it in the general direction?

455 Mr. Pierce. I would like to have just a moment. I would like to supply copies of those four documents to be marked as Exhibits later and will supply them ten days later.

Exam. HADEN. Off the record, please.

(Discusison had outside the record.)

A. The general description is at the beginning point of the south line of the Big Four Railroad about four hundred feet westerly of the——

By Exam. HADEN:

Q. What are you pointing out?

A. I am pointing to the south right-of-way line of the Big Four Railway. The description is the center line description of the sixteen-foot easement. There is an angle in a southwesterly direction about 160 feet to a clearance point with this, with the Wheeling-Lake Erie right-of-way; thence following the Lake Erie right-of-way about one thousand feet to a point in here, in this vicinity, and then on a curve with one hundred-foot chords, a circular distance curving to the south and back to the east and clearing this property as shown on the map as the Rollercade, Incorporated, designated in the description as the Equestrium, and thence easterly to a point on the north line of the Cleveland Provision Company.

By Mr. PIERCE:

Q. Now, Mr. Cobbe, was the same sixteen-foot right-of-way which you have just described here, given by the Cleveland
456. Union Stock Yards Company to the trustee of the Cleveland Provision Company in 1936 the same right-of-way route which was included in the 1916 deed from the stockyards to the Cleveland Provision Company?

A. I can't say for certain, but I think the 1916 deed had no metes and bounds description. They agreed to convey a sixteen-foot right-of-way. They conveyed the right-of-way in the deed, but it was agreed to convey it by a later deed with metes and bounds.

Q. In the trustee's deed, Irving Kane, trustee, the Earl C. Gibbs Company, dated February 16, 1937, is that same right-of-way conveyed by the trustee, Earl C. Gibbs Company?

A. Yes.

Q. It is over the same route toward the west and north and back to the east to connect with the Big Four right-of-way at the north end of the stockyards property?

A. Yes.

Mr. PIERCE. Now, to simplify this thing, if I may, I should like permission here to supply copies of the Ordinance No. 10944 of May 25, 1908; Ordinance No. 18748 of September 6, 1910; the deed of November 24, 1936 from the stockyards to the trustee of the Cleveland Provision Company; the trustee's deed of February

16, 1937 to Earl C. Gibbs Company; a copy of the agreement between the Cleveland Union Stock Yards Company to the Cleveland Provision Company, dated July 14, 1916, and a copy of the deed from the Cleveland Union Stock Yards Company
457 to the Cleveland Provision Company dated July 14, 1916.

Exam. HADEN. Any objection to Mr. Pierce furnishing the documents he just described at the close of the hearing? (No response.) Let the record show no objection.

Mr. Pierce, can you furnish the documents described within fifteen days?

Mr. PIERCE. Yes.

Mr. RYNDER. I assume that I will get a copy.

Exam. HADEN. You will furnish copies to all parties of record and three copies to the Commission; that is, all documents furnished subsequent to the hearing.

By Mr. PIERCE:

Q. Mr. Cobbe, will you tell me if the Court of Appeals, Case No. 15727, which was an appeal of Common Pleas Court No. 444923, what the docket showed the entry was that disposed of that case?

A. "November 24, 1936 to court, settled and dismissed; each party to pay one-half of the costs for which judgment is rendered; mandate to issue; journal 11, page 547."

Q. Will you also tell us what journal 11, page 547 shows?

A. "Case No. 15727, Cleveland Union Stock Yards Company versus Cleveland Provision Company; appeal by the Cleveland Union Stock Yards Company, law and fact. This case is settled and dismissed and by agreement each party to pay one-half the costs, for which judgment is rendered against them.
458 Whereupon court convened and adjourned from time to time until November 27, 1936."

Mr. PIERCE. May I have just a moment, please?

Exam. HADEN. Yes.

Mr. PIERCE. I think you may inquire.

Mr. RYNDER. No questions.

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Cobbe, as I understand your testimony as it has related to trackage other than that owned by the Cleveland Union Stock Yards Company so-called, I believe it has been referred to here as a sidetrack. Anyway, the track that is used by the New York Central in reaching the plant of Swift & Company. Are you familiar with any agreements, either oral or written or by cor-

respondence in any way or other as to the use of that portion of the track?

A. No, sir.

Q. Would any agreements, if any, were made, come under the supervision of your office?

A. No, sir; unless it was—well, I don't know.

Q. You understand the portion of the track to which I have reference?

A. I think you have reference to this track on West side of 65th Street.

Q. Yes.

A. Not necessarily so; I would say there is a possibility
459 that it might, but more likely it wouldn't.

Exam. HADEN. Any further questions of Mr. Cobb?

Mr. PIERCE. I think not.

Mr. BAKER. Mr. Examiner, may I have one question?

Exam. HADEN. Mr. Baker.

By Mr. BAKER:

Q. You stated that a portion of the right-of-way between points G and H on Exhibit No. 12 had been obtained from the Cleveland Union Stock Yards Company. Could you tell me by what form of document that was obtained; that is on the easterly side of West 63rd Street?

A. "To grant unto the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation, grantee, its successors and assigns an easement for the construction, operation, and maintenance of a railroad track in and over the following real estate——

Q. What is the date of the deed?

A. May 11, 1911.

Q. By whom was it made?

A. You mean who signed it?

Q. Yes.

A. Signed by "John F. Whitlaw, President" and "Allen F. Wallace, Secretary."

By Mr. RYNDER:

Q. Of what? Cleveland Union Stock Yards Company?

A. Cleveland Union Stock Yards Company.

By Mr. BAKER:

Q. May 18, 1911?

460 A. May 11th; I have here, May 11, 1911.

Mr. BAKER. Thank you.

Mr. PIERCE. Just one more thing while the witness is on the stand, Mr. Examiner, I would also like leave to submit a map

showing this right-of-way from the Cleveland Provision Company to the Big Four main tracks, which was conveyed by the stockyards to the Cleveland Provision Company. It is not indicated on any map here, and I would like to submit a map showing that route, if we might.

Mr. RYNDER. That is agreeable. That right-of-way is not operated by a railroad switch track.

Mr. PIERCE. I don't understand that it is.

Exam. HADEN. Any further questions of Mr. Cobbe?

Mr. PIERCE. No, sir.

Exam. HADEN. No questions of you, Mr. Cobbe. You may be excused, thank you. (Witness excused.)

Mr. Pierce, before we go ahead, let me ask you, in addition to the ordinance and the documents which you have just described, there is one other prior document.

Mr. PIERCE. It was ordinance No. 18944 and Ordinance No. 18748.

Exam. HADEN. Isn't that 10944?

Mr. PIERCE. 10944; I beg your pardon. Do you want to check the rest of them?

Exam. HADEN. Before you offered to submit those
461 after the hearing, there were a few other documents prior to that time.

Mr. PIERCE. I have the photostat on 11-A which is the one which was to be a photostatic copy, Mr. Rynder, of that sketch.

Exam. HADEN. You are putting that in as an exhibit. Who discussed that exhibit?

Mr. PIERCE. This exhibit went along with the stipulation which was put in Exhibit 11; that was to be 11-A.

Exam. HADEN. This is part of Exhibit 11.

Mr. PIERCE. I would like to put this original in on Exhibit 11.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

You may proceed, Mr. Pierce.

Mr. PIERCE. Mr. Shaner, will you take the chair, please?

L. N. SHANER was sworn and testified as follows:

Direct examination by Mr. PIERCE:

Q. Will you give us your name, please?

A. L. N. Shaner.

Q. What is your position with the New York Central?

A. Chief Clerk of the Law Department.

462 Q. Mr. Shaner, have you in your duties as chief clerk made an investigation to obtain various contracts, let-

ters, and papers in connection with the Swift & Company complaint in Docket 28714?

A. Yes, sir; I did a very full investigation.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 14."

(Exhibit No. 14, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 14," a contract dated May 10, 1899 between the Big Four, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Cleveland Union Stock Yards Company, and will you state if that is a copy of the agreement, original agreement as you found it in the files, or as it was reported to you as being in the files of the Big Four Railroad [indicating]?

A. That is correct; yes, sir.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 15." [indicating].

(Exhibit No. 15, Witness Shamner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 15," and I will ask you to tell us what that exhibit covers.

A. Sidetrack agreement dated March 17, 1938 between
463 the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, the Standard Beef Company, and the Cleveland Union Stock Yards Company.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 16," [indicating].

(Exhibit No. 16, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will ask you to describe this exhibit.

A. That is a sidetrack agreement between the C. C. C. & St. L. Railway Company, Kallem Kreinburg, and William A. Krasny, dba Kreinburg and Krasny, and the Cleveland Union Stock Yards Company. The exhibit also contains an assignment of the agreement dated July 7, 1943 from Kallem Kreinburg and William A. Krasny, dba Kreinburg and Krasny to Kreinburg and Krasny, Inc.

It also indicates the application and consent dated July 7, 1943 of Kreinburg and Krasny, Inc. for permission to allow use of said track by United States Coast Guard, Commissary Supply

Depot, and consent of the New York Central Railroad Company to such use of track.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 17," [indicating].

(Exhibit No. 17, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 17," and I will ask you to describe this exhibit [indicating].

464 A. This exhibit is a sidetrack agreement dated October 1, 1937, between the New York Central Railroad Company, lessee of the C. C. C. & St. L. Railway, Earl C. Gibbs, Inc., and the Cleveland Union Stock Yards Company.

There is also connected with it an application and consent for permitting use of the track by the Hansol Packing Company, which was consented to by the Cleveland Union Stock Yards Company. It also covers use by two other industries.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 18" [indicating].

(Exhibit No. 18, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 18," and I will ask you to describe it [indicating].

A. This is a copy of an agreement, sidetrack agreement, dated November 25, 1916, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Swift & Company.

Mr. PIERCE. May I go off the record here just a moment, please?

Exam. HADEN. Off the record.

(Discussion had outside the record.)

Exam. HADEN. Mr. Pierce, we were off the record. Will you restate it?

Mr. PIERCE. We would like permission of the Examiner
465 and the parties to this action to submit a blueprint which accompanied Exhibit No. 18, being the agreement of November 25, 1916, between the C. C. C. & St. L. Railway Company and Swift & Company, the blueprint showing the tracks covered by that agreement,

Exam. HADEN. There being no objection, it may be supplied within fifteen days of the hearing and you will clearly indicate, Mr. Pierce, that it is to be——

Mr. PIERCE. Attached to Exhibit 18.

Exam. HADEN. To be attached to Exhibit 18.

Mr. PIERCE. All right, sir.

I would like to have this marked for the purpose of identification as "Exhibit No. 19."

(Exhibit No. 19, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 19," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Henry C. Thom, doing business under the firm name of People's Packing Company of Cleveland, Ohio, dated October 27, 1910.

Q. Is that a cancelled contract, one which is not now in effect?

A. It is no longer in effect, that's right.

Mr. PIERCE. I would like to have marked for the purpose of identification this as "Exhibit 20" [indicating].

(Exhibit No. 20, Witness Shaner, marked for identification.)

466 By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 20," and I will ask you to describe it [indicating].

A. This sidetrack agreement is dated May 25, 1912, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Henry C. Thom, doing business as the People's Packing Company of Cleveland, Ohio.

Q. And is this contract in effect?

A. It is no longer in effect.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 21" [indicating].

(Exhibit No. 21, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 21," and I will ask you to describe this document [indicating].

A. It is a sidetrack agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Federal Packing Company and it should be dated March 28, 1927, and also a letter dated May 5, 1931, indicating an agreement of March 28, 1927, superseded by agreement dated November 24, 1930.

Q. And this Exhibit 21 is not now in effect?

A. It is no longer in effect.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 22" [indicating].

467 (Exhibit No. 22, Witness Shaner, marked for identification).

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as Exhibit 22, and I will ask you what that is [indicating].

A. This is a sidetrack agreement dated November 24, 1930, between the New York Central Railroad Company and the Federal Packing Company, and also contains as assignment by the Federal Packing Company to Swift & Company dated April 2, 1938.

Mr. PIERCE. Now, at this point, Mr. Rynder, are you willing to stipulate that the Henry C. Thom, doing business under the firm name of People's Packing Company, named in the exhibits 19 and 20, were the predecessors of Swift & Company?

Mr. RYNDER. I think I am willing to stipulate what you want, but I don't think that is exactly the fact. I think Henry C. Thom simply continued to manage the plant after it had been bought by the Swift & Company. I think we purchased the plant in 1905.

Mr. PIERCE. Well then, your stipulation is that he was the agent for Swift & Company.

Mr. RYNDER. That he was the authorized agent for Swift & Company.

Mr. PIERCE. And in Exhibit 21 and 22 referring to the Federal Packing Company, that the Federal Packing Company was a predecessor of Swift & Company?

Mr. RYNDER. Yes, sir.

468 Mr. PIERCE. All right. I would like to have this marked for the purpose of identification as "Exhibit No. 23" [Indicating].

(Exhibit No. 23, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 23" and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated March 28, 1927, between the Cleveland, Cinicinnati, Chicago and St. Louis Railway Company, first party, and Hughes Provision Company, second party.

Q. Now in effect?

A. That's right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 24" [indicating].

(Exhibit No. 24, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 24," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated August 1, 1922, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Koblenzer Brothers.

Q. Which is now in effect?

A. That's right.

469 Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 25" [indicating].

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 25," and I will ask you to describe it [indicating].

(Exhibit No. 25, Witness Shaner, marked for identification.)

A. It is a sidetrack agreement dated November 27, 1916, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Theurer Norton Provision Company.

Q. This contract is no longer in effect?

A. That is correct.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 26" [indicating].

(Exhibit No. 26, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 26," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated March 15, 1917, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as first party, and the Theurer Norton Provision Company as the second party, and Swift & Company as the third party.

Q. And this agreement is no longer in effect?

A. That is correct.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 27" [indicating].

470 (Exhibit No. 27, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit 27," I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated January 22, 1934, between the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, and Theurer Norton Provision Company.

Q. This agreement is now in effect?

A. That is right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 28" [indicating].

(Exhibit No. 28, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 28," and I will ask you to describe that document [indicating].

A. It is a sidetrack agreement dated May 14, 1934, between the New York Central Railroad Company, lessee, of the Cleveland, Cincinnati, Chicago and St. Louis Railway, and Theurer Norton Provision Company, and Swift & Company.

Q. And is this agreement now in effect?

A. It is. It also contains a supplemental agreement dated February 19, 1935, between the same parties.

471 Mr. PIERCE. Mr. Examiner, if I might do so, I should like to introduce at this time one of the documents which we asked a while ago to introduce later, and that is ordinance 18748–A of 1910. We do have a copy of it now.

Exam. HADEN. It will be marked as "Exhibit No. 29."

(Exhibit No. 29, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 29" and ask you if this is a copy of Ordinance 18748–A, which has been referred to in the trial here [indicating]?

A. It is; yes, sir.

Q. Mr. Shaner, you have heard reference made to easements granted to the Big Four Railroad providing for a sixteen-foot strip right-of-way in order to serve Swift & Company's plant located easterly of West 65th and westerly of West 63rd Street. I hand you what will be marked for the purpose of identification as "Exhibit No. 30" and will ask you to tell us—to describe this document [indicating].

(Exhibit No. 30, Witness Shaner, marked for identification.)

A. This exhibit contains easements which were granted from the Blumenstock & Reid Company; Henry C. Thom, et al.; Theurer Norton Provision Company, et al.; Henry C. Thom, et al., to the Cleveland Union Stock Yards Company and H. C. Thom, et al., all to the C. C. C. & St. L. Railway Company, granting the sixteen-foot easement required in order to reach and
472 serve predecessors of the present Swift & Company plant located easterly of West 65th Street and westerly of West 63rd Street.

Mr. PIERCE. I would like to have marked for the purpose of identification this document as "Exhibit No. 31."

(Exhibit No. 31, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 31" and I will ask you to describe that document [indicating].

A. It is a letter dated December 31, 1934, written by A. Z. Baker, president and general manager of the Cleveland Union Stock Yards Company to Mr. C. M. Williams, superintendent of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 32" [indicating].

(Exhibit No. 32, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 32," and I will ask you to describe it [indicating].

A. It is a letter dated January 11, 1935, written by A. Z. Baker, president and general manager of the Cleveland Union Stock Yards Company to Mr. C. M. Williams, superintendent of the New York Central Lines, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 33" [indicating].

473 (Exhibit No. 33, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 33," and I will ask you to describe that document [indicating].

A. It is a letter dated October 6, 1938, written by F. S. Risley, Assistant Vice President and General Manager of the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, to the Standard Beef Company, Cleveland, Ohio.

Q. Is that in connection with modifying sidetrack agreement of March 17, 1938?

A. That carries a form of modification dated October 15, 1938, which was executed on behalf of the Standard Beef Company.

Q. On the date of October 15, 1938?

A. On the date of October 15, 1938.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 34" [indicating].

(Exhibit No. 34, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 34," and ask you if that is the same type

of document as was Exhibit No. 33, but addressed to Kallem Kreinburg and William A. Krasny, copartners, doing business as Kreinburg & Krasny in connection with modifying its sidetrack agreement?

474 A. That is right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 35" [indicating].

(Exhibit No. 35, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 35" and ask you if that is the same type of document as Exhibit No. 33, but addressed to Earl Gibbs, Incorporated, in connection with its sidetrack agreement dated October 1, 1937 [indicating]?

A. That is correct.

Q. And is there an acceptance of this Earl C. Gibbs modification?

A. Yes. It is, but I have blank 1938, no date.

Q. That is, the actual date is not given?

A. No.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 36" [indicating].

(Exhibit No. 36, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 36" and ask you if that is the same type of document as Exhibit No. 33, but addressed to Swift & Company, regarding the modification of its sidetrack agreement of November 24, 1930 [indicating]?

A. That is correct.

Mr. PIERCE. I would like to have you mark this for
475 the purpose of identification as "Exhibit No. 37" [indicating].

(Exhibit No. 37, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 37" and ask you to describe that document [indicating].

Mr. RYNDER. Just to save time later on, as to Exhibit 36, that shows no averment of Swift & Company?

WITNESS. No acceptance.

Mr. RYNDER. Thank you.

A. It is a letter dated November 22, 1938, from F. S. Risley, Assistant Vice President and General Manager of the New York

Central Railroad Company, to Swift & Company at Cleveland.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 38" [indicating].

(Exhibit No. 38, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 38," and I will ask you to describe it [indicating].

A. It is a letter dated December 2, 1938, written by Swift & Company, per J. H. H. to F. S. Risley, Assistant Vice President of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 39" [indicating].

(Exhibit No. 39, Witness Shaner, marked for identification.)

476 By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 39," and I will ask you to describe that document [indicating].

A. It is a letter dated January 6, 1939, written by F. S. Risley to Swift & Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 40" [indicating].

(Exhibit No. 40, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 40," and I will ask you to describe that document [indicating].

A. It is a letter dated January 30, 1939, written by Swift & Company, per J. H. H. to F. S. Risley, Assistant Vice President, New York Central Railroad, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 41" [indicating].

(Exhibit No. 41, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit No. 41," I will ask you if it is the same type of document as Exhibit No. 33 except that it is addressed to the Hughes Provision Company, pertaining to its sidetrack agreement of March [indicating]?

A. It is.

Mr. PIERCE. I would like to have this marked for
477 the purpose of identification as "Exhibit No. 42" [indicating].

(Exhibit No. 42, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 42," and I will ask you to state if that is the same type of document as Exhibit No. 33, but is addressed to Christian Koblenzer and Matthias Koblenzer, doing business as Koblenzer Brothers and referring to a sidetrack agreement of August 1, 1922 [indicating]?

A. That is correct.

Q. Was there an aceptance indicated on that modification?

A. Yes; it was accepted November 18, 1938.

Mr. PIERCE. I would like to have marked for the purpose of identification this paper as "Exhibit No. 43" [indicating].

(Exhibit No. 43, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit No. 43," I will ask you if that is the same type of document as Exhibit No. 33, except that it is addressed to Theurer Norton Provision Company and Swift & Company, and pertains to the sidetrack agreement of May 14, 1934 [indicating].

A. That is correct.

Mr. PIERCE. I would like to have marked for the purpose of identification this document as "Exhibit No. 44."

478 (Exhibit No. 44, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 44" and will ask you to describe that document [indicating].

A. It is a letter dated November 11, 1938 from the Theurer Norton Provision Company by August F. Lucht, Secretary, and addressed to F. S. Risley, Assistant Vice President and General Manager of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 45" [indicating].

(Exhibit No. 45, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 45," and ask you if that is the same type of document as Exhibit No. 33, except it is address to the Theurer Norton Provision Company, and referring to its sidetrack agreement of January 22, 1934 [indicating]?

A. It is the same type of letter except it is dated November 29, 1938.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 46" [indicating].

(Exhibit No. 46, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of
479 identification as "Exhibit No. 46," and I will ask you to describe this document [indicating].

A. It is a letter dated November 18, 1938 from Koblenzer Brothers, per E. Galbraith to the Interstate Commerce Commission, Washington, D. C.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 47" [indicating].

(Exhibit No. 47, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 47," and I will ask you to describe it [indicating].

A. It is a letter dated November 26, 1938 from W. P. Bartel, Secretary, Interstate Commerce Commission, to F. O. Stafford, freight traffic manager, New York Central System, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 48" [indicating].

(Exhibit No. 48, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 48," and I will ask you to describe this document [indicating].

A. It is a letter dated December 6, 1938 from F. O. Stafford, freight traffic manager, New York Central Railroad Company, Cleveland, Ohio, to W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C., to which is attached Ex-
480 hibits A and C, both being letters, one bearing the date of December 31, 1934 and the other January 11, 1935.

Mr. PIERCE. May we be off the record, please, Mr. Examiner?

Exam. HADEN. Off the record.

(Discussion had off the record.)

Exam. HADEN. On the record.

Mr. PIERCE. I think that is all. At this time we offer these exhibits in evidence.

Exam. HADEN. Exhibits 14 to 48, both inclusive, by Witness Shaner, have been offered, and if there is no objection, they will be received in evidence. Let the record show no objection is noted, and they may be received.

(Exhibits 14 to 48, Witness Shaner, received in evidence.)

Mr. PIERCE. Mr. Examiner, at this time I would like to offer a stipulation here, which Mr. Rynder is agreeable to, as I understand. This stipulation covers the testimony of Mr. Pearson F. Marsh, Special Agent of the Interstate Commerce Commission, in Ex Parte No. 127 hearing, July 29, 1939, in which he stated in the record, pages 824, 825 the statements made in this stipulation, and after quoting Mr. Marsh's testimony, there is a further description of carrying through to the conclusion of the ownership of stock by Swift & Company into the Cleveland Union Stock Yards Company, terminating in 1936, and I would suggest
481 that the reporter copy the whole thing into the record if it is agreeable.

Exam. HADEN. Instead of an exhibit?

Mr. PIERCE. Whatever you prefer, Mr. Examiner. An exhibit is all right with us, Mr. Examiner.

Exam. HADEN. I think it will serve the same purpose as an exhibit. If there is no objection to that being stipulated in the record, the statement just referred to, by Mr. Pierce, extract of testimony of Witness Special Agent Marsh, it may be received as Exhibit 49.

(Exhibit 49, marked for identification and received in evidence.)

Mr. PIERCE. My Rynder, I understand in your statement this morning you were willing to concede that there were sixty-day terminating clauses in all of the sidetrack agreements?

Mr. RYNDER. Yes, sir.

Mr. PIERCE. May we be off the record, please, Mr. Examiner?

Exam. HADEN. Off the record.

(Discussion had off the record.)

Exam. HADEN. On the record. Mr. Pierce, have you any witnesses available that could give the Commission any information as to what arrangements the railroads would make for the delivery of livestock in the Cleveland area if and when the Livestock Terminal Service Company discontinues the loading and
482 unloading, assuming that is not continued, that service, by the Cleveland Stock Yards Company.

Mr. PIERCE. Mr. Examiner, I might say that we don't have present a witness who could answer that question now. There has been a joint petition filed in Docket 28421 to review the cost picture for the loading and unloading service at the Cleveland Union Stock Yards, and as far as I know, at this time, there has been no arrangement made for the loading and unloading at the end of the sixty days or on or about August 19th. There is in progress, and we have had one or two discussions with Mr. Baker on it, negotiations looking toward some solution of the situation at the stockyards.

Exam. Haden. How about with the Livestock Terminal Service Company, have you had any conference with them as to continuing this service?

Mr. Pierce. The Livestock Terminal Service Company joined with the railroad company in this petition in 28421 to reopen it as to the cost study there.

Exam. Haden. I will ask you this question: In connection with the petition for postponement, which the New York Central and certain other rail carriers filed in Finance Docket No. 14038, the reply of the applicant, the Livestock Terminal Service Company stated that the Applicant is insolvent and simply without means of credit to pay its employees or its other charges after
483 June 19, 1944; that is the effective date of this abandonment of its supplemental tariff.

On last Monday I learned that the tariffs of the Service Company had been postponed sixty days. I will ask you, if you know, whether the railroads in any way agreed to make up any difference that the Livestock Terminal Service Company might lose or losses they may incur, of any portion of the loss they may incur in the next sixty days.

Mr. Pierce. The railroad companies did not agree to anything in any manner other than may be set forth in the petition to reopen 28421.

Exam. Haden. I will ask you that question because the third paragraph of that petition clearly indicates that the Livestock Terminal Service Company could not possibly go beyond June 19th, and yet almost overnight they find some means to continue for the sixty days. I wonder if any gentlemen here would be in a position to tell the Commission how that is being done. I appreciate we have no witnesses from the Livestock Terminal Service Company, but in view of the importance of the matter, I think the Commission would like to be advised.

Mr. Fitzpatrick. Mr. Examiner, the petition filed in 28421, Sub 1, to review the charge for loading and unloading, sets forth that the Service Company has approved some arrangement with the Stock Yards Company that will enable it to continue operations for a limited period.

The railroads say in that petition that they will
484 continue to pay $1.25 per deck, but they do agree in the petition to readjust the charge on shipments handled on June 19, 1944, and thereafter to correspond with the Commission's findings, but the railroads have made no commitment to underwrite any deficit during this period from June 19, 1944 and thereafter.

Exam. Haden. I will ask Mr. Baker if you contemplate putting on a witness in this case?

Mr. BAKER. Mr. Examiner, if you care for me to do so, I will be glad to take the stand and maybe we can clear up a few points.

Exam. HADEN. I believe the Commission would like to have the information. It is an important matter and I think it is a very opportune time for the Commission to be given what data is available. If you do that, I will ask you to withhold your testimony until the railroads have completed their case and Mr. Rynder any rebuttal testimony.

Mr. RYNDER. Mr. Examiner, I simply wanted to make an objection, with the utmost deference to the Examiner, with respect to the complaint in 28714 which is not at all important what may happen in the abandonment case. We don't care, so far as our case is concerned, whether the unloading in the stockyards is continued by the Stock Yards Company or the railroad. In any event our livestock would be unloaded in the stockyards and we would have to pay yardage charge to get it out, and that is the situa-
485 tion we are complaining of. I am not concerned with the things you are asking about, and I don't think they have a part in this case.

Exam. HADEN. Of course, Mr. Rynder, in the event no agreement is reached, no determination made or some means found for the railroad to serve your plant in Cleveland, and if loading and unloading of livestock would discontinue at the public stockyards, it would leave you without any rail——

Mr. RYNDER. I imagine we would have to bring it all in by truck.

Exam. HADEN. So, I will ask Mr. Baker later on if he will give the Commission whatever information he has available. Anything further, Mr. Pierce?

Mr. PIERCE. I think outside of the report from the engineers on the dimensions of the stock pens out there, that is all.

Exam. HADEN. Well, we will take a recess for ten or fifteen minutes.

Mr. PIERCE. And if Mr. Baker goes on the stand, we want to ask him a few questions.

Exam. HADEN. All right. We will recess now.

(Recess had.)

Exam. HADEN. Come to order please, gentlemen.

Mr. PIERCE. I would like to recall Mr. Cobbe.

Exam. HADEN. When you are ready to proceed, you may.

486 RICHARD C. COBBE, having been previously sworn, was recalled, and testified as follows:

Direct examination (resumed) by Mr. PIERCE:

Q. Mr. Cobbe, in Mr. Pastor's testimony, he referred to the section of the stockyards track No. 10, which is indicated in yellow

print on Exhibit No. 12; that that track passed over the property of the Standard Beef Company from point C to C–1 and the property of Kreinburg & Krasny from point C–2 to point D–1 and from point D to F. Will you state for the record whether or not that is a correct statement, or can you correct it so that we may have the record show the correct situation here?

A. Both the properties of the Standard Beef Company and Kreinburg & Krasny were conveyed by the Cleveland Union Stock Yards Company at different times. In those deeds the Cleveland Union Stock Yards Company excepted and reserved from those premises a right-of-way from the railroad switch tracks crossing the premises. It is now located or hereafter changed or relocated.

Mr. PIERCE. That is all. I just wanted to get that correction in the record, Mr. Examiner, and I would like to state at this time that during the recess Mr. Rynder and I discussed this question of the area of the pens inside of the Swift & Company's plant, and we would prefer, if the Examiner is agreeable, to have the
487 engineers of Swift & Company, and the New York Central agree on the dimensions and submit a blueprint which will set forth the accurate dimensions as to the pens and the location of the pens on the property; is that right, Mr. Rynder?

Mr. RYNDER. That is correct.

Exam. HADEN. That will be furnished at the same time the other documents will be furnished the Commission within fifteen days?

Mr. PIERCE. Yes, sir.

Exam. HADEN. And what will be the title or character of the exhibit?

Mr. PIERCE. I suppose—let us say size and location of stock pens on Swift & Company's property; is that the way you want that?

Mr. RYNDER. Some way or another, whichever way you describe it. I understand very roughly it will be a blueprint of the pen area of pens, and then the dimensions.

Mr. PIERCE. That is right.

Exam. HADEN. Gentlemen, the supplemental document that will be furnished will be given Exhibit numbers and you will be notified of the numbers assigned to them.

Mr. PIERCE. The only other thing I haven't noted at this time—perhaps Mr. Rynder will introduce it—is the March 19, 1908 agreement to which Mr. Ford testified this morning.

488 Mr. RYNDER. Wasn't that part of your exhibits?

Mr. PIERCE. March 19, 1908?

Mr. RYNDER. May we be off the record, please, Mr. Examiner.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. RYNDER. Mr. Examiner, Mr. Pierce inquired about that agreement, about that March 19, 1908 agreement, and it is so short, rather than defer it and have it copied, I think Mr. Ford could read it into the record right here, but I also question as to whether I was going to put him on back for rebuttal, but I think all the evidence of the defendants should go in before I put him back on.

EXAM. HADEN. I understood you to say, Mr. Pierce, that all your evidence is in?

Mr. RYNDER. I understood Mr. Baker was going on.

Mr. PIERCE. Except for the few questions that I want to ask Mr. Baker.

Mr. RYNDER. The Cleveland Union Stock Yards is a defendant.

EXAM. HADEN. Is a defendant; yes. All right, Mr. Baker.

A. Z. BAKER was sworn and testified as follows:

489 EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Baker, do you have any statement that you wish to make for the record?

A. My name is A. Z. Baker. I am President of the Cleveland Union Stock Yards Company, and I have been in that capacity since 1925.

It has been charged in this proceeding, and I don't know whether that claim is being still maintained or not, that the Cleveland Union Stock Yards Company is a common carrier by railroad and subject to the Interstate Commerce Act. I should like to say that the company was not incorporated for the purpose of engaging in the common carrier business, and insofar as it has been able to, it has not engaged in that business.

As to the track in question in this proceeding, during the last nineteen or twenty years in which I have been connected with the Stock Yards Company, we have at no time considered that that track was dedicated to public use or that it was anything else than a private sidetrack subject to our control, subject to the Stock Yards Company's control under existing contracts with the railroads. We have consistently taken that position in all of our dealings with the railroads or with the packers in connection with that track.

I have made a search of such records as are available in the company and can find nothing to indicate anything different.

That is all I wanted to say, Mr. Examiner. I believe
490 you had some questions that you wanted me to answer.

Q. Mr. Baker, a few moments ago I asked counsel for the

New York Central and also Mr. Fitzpatrick, who, I believe was also present at the time, and also Mr. Pierce, as to whether they knew if any plan had been devised for the railroads to underwrite at least the portion of the Livestock Terminal's alleged deficit in the loading and unloading of livestock for the sixty-day period beyond June 19, 1944, and he stated that the railroads will not in any way make up any of the deficit of the Livestock Terminal Service Company in its operation at the stockyards. I will ask you if the Cleveland Union Stock Yards Company is in any way giving a helping hand to the Livestock Terminal Service Company during this sixty-day period?

A. Mr. Examiner, in furtherance of the Commission's suggestion in the report in finance docket 14038, the parties undertook to work out a solution to the situation, and we have offered to withhold the collection of rent for the two months, it being understood that if the Commission grants an increase in the charges, that the rental charges will be adjusted likewise back to June 19th, and that is the form of help we are giving them during this sixty-day period.

I would like to say also, and perhaps it will answer the doubt that seems to be in your mind: It seems to me that it is inconceivable that that service of loading and unloading livestock would be discontinued. The Stock Yards Company has in-
491 dicated a willingness to make its facilities available for that service at an agreed or arbitrary rental. It has gone further than that. Certainly the mere performance of the loading and unloading, whether it is by the railroads or the service company, or even the Stock Yards Company, there just doesn't seem that there is a possibility that it will be terminated. We have considered, and the Commission has said that the duty of unloading the livestock is the ultimate duty of the line haul carriers. There are a great many reasons why the Stock Yards Company does not want to engage in that business. I think maybe I have answered more than you expected me to.

Q. Then, do I understand your statement to be that the Livestock Terminal Service Company is able to operate for this next sixty-day period because of you withholding the rental charge for the use of the facilities?

A. That is correct. In other words, the Stock Yards Company is underwriting it to the extent of the losses, if any, during this period under an adjusted rate, whatever that might be.

Exam. Haden. I think you, sir. Any question of Mr. Baker?

Mr. Pierce. I would like to ask several, if I may, Mr. Examiner.

Examination by Mr. PIERCE:

Q. Mr. Baker, as president of the Cleveland Union Stock
492 Yards Company, will you state whether or not any officer of Swift & Company has been a director of the Cleveland Union Stock Yards Company between 1916 and 1936?

A. A manager of the Cleveland plant, or a general manager of the Cleveland plant has been, or was continuously from 1916. I think it was in November from sometime in 1936.

Q. That was the Cleveland plant manager of Swift & Company was a director of the Cleveland Union Stock Yards Company during that period?

A. That is correct, and he was elected a director at the request of the President of Swift & Company.

Q. During that period were there several changes in the management so that different parties served as directors from the Swift & Company's plant?

A. There were two changes during that period; the first director was M. T. Morgan, who served from November 2, 1916 to January 17, 1918. W. G. Fletcher, who served from November 7, 1918 to November 2, 1922, and E. W. Phelps, who served from 1922 to April 28, 1936.

Q. Mr. Morgan, Mr. Fletcher, and Mr. Phelps in each instance were the Cleveland managers of the Swift & Company?

A. That is correct.

Q. And on the Board of Directors of the Cleveland Union Stock Yards Company. Did any of these Swift & Company managers serve as a member of your Executive Committee, if you have one?

A. During a part of ths period, between 1916 and 1936
493 there was an Executive Committee and the Board appointed the Committee, and during any such time as there was an Executive Committee, the Swift & Company representative on the Board was a member of the Executive Committee.

Q. Do you know what period that was during the twenty years there from 1916 to 1936 that there was an Executive Committee in existence?

A. No; I can't tell you that.

Q. Was it in the early part of the latter part?

A. I know there was an Executive Committee in 1916, but I don't know how long it continued.

Q. After that?

A. That's right.

Q. Do you know if the records of the Stock Yards Company show that this Swift & Company plant manager was a member of any other committees or activities of the Stock Yards Company's organization?

A. No; I don't recall that he was.

Q. Did you have, or is there, or was there a committee so-called, a Traffic Committee over at the stockyards district of the stockyards and packers on connection with activities in that district?

A. There was a Traffic Committee appointed in 1920. I think it served until 1924, the latter part of 1924.

Q. What was the purpose of that Committee?

494 A. Well, to review traffic matters and improve the service into and out of the yards and to consider matters of a transportation and traffic nature.

Q. Do the Stock Yards Company's records show who the Swift & Company's manager was who was a member of that Committee?

A. The manager was not, but the traffic manager was.

Q. A member of that committee?

A. Yes.

Q. The Traffic Committee consisted of whom, Mr. Baker?

A. The traffic manager of the Swift & Company, traffic manager of the Cleveland Provision Company, and the traffic manager of the Stock Yards Company.

2. Mr. Baker, what meetings, if any, or within your knowledge as having been had with Swift & Company and its officers or representatives in connection with the use of the so-called stockyards track No. 10 in order to reach Swift & Company's plant located over on West 63rd Street?

A. I don't recall anything, Mr. Pierce, other than conversations we have from time to time. I don't think we have had any dealings with them for the use of it. They haven't made any demands upon us and we haven't made any demands upon them. Our dealings have been with the railroads with whom we had contracts.

Q. When you speak of conversations, would you state whether or not those conversations were with some officer or representative of Swift & Company and what if any bearing it had upon

495 the use that the railroad made of the stockyards track in order to reach Swift & Company's plant?

A. Well, I couldn't recall with enough definiteness to testify about it.

Q. When the Swift & Company's manager was a member of the Board of Directors of the Cleveland Union Stock Yards Company, did this manager attend the meetings and take an active part in the operation of the company, so far as you know, or the record shows?

A. The record shows that he was regular in attendance and during the period in which I was connected with the company he took a very active part.

Q. Mr. Baker, are you familiar with the time in 1926 when Swift & Company desired to erect crossing gates and signals over West 65th Street in order to drive the stock from the stockyards to Swift & Company's plant on the east side of West 65th Street?

A. Yes; I recall the matter.

Q. Were there any negotiations at that time, as you recall, with reference to getting over the stockyards track No. 10; that is, with the stock yards company?

A. Mr. Pierce, for some time previous to that Swift & Company had driven their livestock across this track No. 10 across West 65th Street to their plant. These gates were erected simply to confine the livestock as it was being driven across the tracks
496 and across West 65th Street, I don't recall any other negotiations in respect to the gates. I do recall from time to time that we had negotiations or conversations with them with respect to the condition of the crossing where they crossed the tracks.

Q. That is Swift & Company discussed with the Stock Yards Company the question of driving their stock across your track No. 10?

A. That's right.

Q. And at the time the gates were put up in 1926, did Swift & Company handle with you or with the stockyards anything at all in connection with installing crossing gates across your track No. 10, if you recall?

A. I don't recall, Mr. Pierce.

Q. The dealings that you recall are with reference to a paving or getting the stock across the track?

A. That is all I recall.

Q. Was any written contract entered into between Swift & Company and the Stock Yards Company with reference to the question of driving stock across your No. 10 track?

A. Not that I know of.

Q. That was just by conversation; a verbal understanding?

A. It was just egress we furnished to those who bought livestock at the stockyards.

Q. Just one or two other questions, if I might, please. At the time, Mr. Baker, in 1934 or 1935 that the question arose with
497 reference to moving livestock over the stockyards track No. 10, you wrote to the railroads, and those communications, please, are in here as exhibits, but I would like to ask if you had any dealings with Swift & Company or any other packers served by that track with reference to the change that the Stock Yards Company desired to make with reference to restricting livestock over track No. 10?

A. Mr. Pierce, prior to about 1930 there was little, if any, livestock delivered directly to the plant of Swift & Company, at least if there was any, we didn't know about it. And along in the early thirties, in order to avoid what seemed to be discrimination in providing egress and storage delivery services for Swift & Company as compared with the service being rendered to the farmers, the Stock Yards Company attempted to make a charge from the packers and Swift & Company began to divert livestock from the stockyards to their plant and the volume in 1933 or 1934 had reached such proportions, that we felt it necessary to call upon you to stop the use of the track for the delivery of livestock. We had understood in our contracts that those tracks could be used so long as it didn't interfere with our business, and obviously the diversion of livestock from the stockyards to Swift & Company's plant would constitute an interference with our business.

Q. Then, at the time in 1934 and 1935 when you served this notice upon the railroad companies, was anything at all
498 said by you or the Stock Yards Company to Swift & Company or the packers about your intention to change or restrict the use of this track No. 10, if you haven't already answered that question?

A. As I recall, we had at least one general meeting of the packers out there discussing the matter of deliveries. The packers were of the opinion that they were entitled to a delivery, egress from the yards on shipments consigned direct to them without any extra charge over and above the line haul rate and they based their position on the decision which has recently been recommended by the Commission in the Allied Packers case in Buffalo—I don't recall the volume and case—and the packers generally declined to pay any charges for that service. There may be—I don't recall of any other conversations with Swift & Company with regard to it.

Q. Did Swift & Company have a representative in that meeting in 1934 or whenever it was along about that time in which this proposal to restrict the use of No. 10 track was discussed?

A. I am quite sure they did, but I am trying to recall it. I do know that this matter was discussed in our Board meeting a number of times, and a representative of Swift & Company was there.

Q. Now, Mr. Baker, with reference to this Cleveland Provision Company transaction, would you state for the record here how the controversy was terminated in the court action. I think the record shows here that the court action was settled and
499 dismissed, and if you will state how that was terminated between the Stock Yards Company and the Cleveland Provision Company, we would like to have the record show it.

A. I think when you have furnished copies of those exhibits that you are to furnish, they will probably tell the facts. During the discussions in court and before the Examiner in connection with that matter, it was recognized that while the Stock Yards Company had undertaken to give the Cleveland Provision Company a right-of-way to the land which the Stock Yards Company had sold to the Cleveland Provision Company, the Cleveland Provision Company in turn should not use that land or that right-of-way for the transportation of livestock to its plant or for the erection of stock pens on that land and the granting of a right-of-way specifically reserved those and provides for a termination of that right-of-way in the event the grantee does either—uses the track for the transportation of livestock to the plant or erects stock pens on the land, and with that arrangement the Stock Yards Company and the grantee, who was the trustee of the Cleveland Provision Company, were agreeable to a dismissal of the proceeding.

Q. Then, am I correct in my assumption that there was no written agreement settling the controversy between the trustee of the Cleveland Provision Company and the Stock Yards Company at that time?

A. The granting of the right-of-way was the fulfillment
500 of that agreement. In other words, we had agreed upon the terms of the right-of-way and when it was executed and filed, the case was dismissed.

Q. Mr. Baker, do I understand that it is the position of the Cleveland Union Stock Yards Company now, as holding itself out to the packers and other industries reached by track No. 10, that the Stock Yards Company extends the use of that track for all traffic other than livestock at this time?

A. No; that is not the position of our company.

Q. Will you make that clear, please?

A. The position of our company is that we have contracted with you, the railroads, the New York Central Railroad, to permit its use of that track for traffic other than livestock. We have made no holding out to the packers on that in connection with that track at all, and we have indicated a willingness to permit the use of that track for the transportation of livestock upon the payment of the charge.

Q. I think there is just one more question. To clear up the record here, I would like to state that we have in time referred to track No. 10 and sometimes to track No. 245. They are one and the same track, 245 being one number, and track No. 10 being the Big Four number; I don't recall which.

By Exam. HADEN:

Q. Will you describe it on Exhibit 12?

A. On Exhibit 12 it would be——

Mr. PIERCE. I think the next exhibit does show the
501 track numbers, Mr. Examiner.

A. On Exhibit 13 this so-called track number ten is a track designated by letters B to C–3; that is the track that is owned by the Cleveland Union Stock Yards Company on Cleveland Union Stock Yards land except for that portion at the southern end designated by C to C–1 and from C–2 to C–3.

By Exam. HADEN:

Q. That is on Exhibit 12?

A. On Exhibit 13; and that track and the operation of that track is covered by the sidetrack agreement of June 16, 1924; I don't recall the exhibit number that was introduced.

Q. Track No. 10, Mr. Baker, is sometimes referred to as track No. 245, is it not?

A. Yes, sir.

Mr. PIERCE. And also as 26–A in some instances, Mr. Examiner.

By Exam. HADEN:

Q. One and the same track; all three references, No. 245, No. 10——

A. And NYC 26–A.

Mr. PIERCE. I think that is all.

Exam. HADEN. Any further questions of Mr. Baker?

Mr. RYNDER. No questions.

Exam. HADEN. You are excused; thank you, sir. (Witness excused.)

Exam. HADEN. Does that conclude the testimony of all the defendants? (No response.)

502 Mr. PIERCE. I would like, if it is agreeable to the Examiner and to the parties here to introduce two more exhibits. This first one, which will be marked "No. 50" is a copy of the agreement between the CCC and St. L. Railway Company and Swift & Company, covering the crossing gates and signals at Union Stock Yards and West 65th Street and is dated November 2, 1926.

Exam. HADEN. That is in two sheets?

Mr. PIERCE. In two sheets; yes, sir.

(Exhibit No. 50, marked for identification.)

Exam. HADEN. Any objection to this exhibit being received in evidence?

Mr. RYNDER. None at all. I am merely doing that to shorten the time. I think it is irrelevant and I have thought that of a great deal of the evidence.

Exam. Haden. It may be received.

(Exhibit No. 50, received in evidence.)

Mr. Pierce. The only other thing is a copy of the joint petition by the railroads and the Livestock Terminal Service Company for rehearing, reconsideration, and redetermination of reasonable charges for loading and unloading livestock at Cleveland, Ohio, as of June 19, 1944, and therefore, which was filed in Docket No. 28421, Sub 1, on June 17, 1944. Shall we call that Exhibit 51?

503 Exam. Haden. It may be identified as Exhibit No. 51.

(Exhibit No. 51, marked for identification.)

Exam. Haden. If there is no objection, Exhibit 51 will be received in evidence. (No response.)

(Exhibit No. 51 received in evidence.)

Mr. Pierce. That is all we have, Mr. Examiner.

Exam. Haden. That completes the defendants' case. Mr. Rynder, do you have something further to offer?

Mr. Rynder. I think not.

Mr. Pierce. Did you put in that agreement?

Mr. Rynder. Mr. Ford, will you take the stand again?

Gilbert F. Ford having been previously sworn, was recalled, and testified as follows:

Further direct examination by Mr. Rynder:

Q. Mr. Ford, I hand you a document consisting of two sheets and ask you if it is a true and correct copy of a certain agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Henry C. Thom, executed at March 19, 1908 [indicating]?

A. It is.

Mr. Rynder. Mr. Examiner, to save delay in copying it and serving it on the parties, I should like to have it read into the record, if I may.

504 Exam. Haden. It may be copied into the record at this point.

AGREEMENT

"We, Henry C. Thom and Julia G. Thom, his wife, in consideration of the benefits and privileges accruing to us by reason thereof, do each severally for ourselves, our heirs and assigns, to the extent of the ownership of us or either of us in the property hereinafter described, hereby grant unto The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns, an assigns, as easement for the construction, operation, and maintenance of a railroad track in and over the following-described

property, to wit: Being a strip of land sixteen feet in width off the easterly side of sublots Nos. 285 to 255 inclusive of Julia A. Sargent's allotment of part of original Brooklyn Township Lot No. 34 as recorded in Volume 23, page 26, of the Records of Maps of Cuyahoga County, Ohio, and also for the construction, maintenance, and operation of a track upon and over the street upon which said lost abut.

To have and to hold the said easement in said lands unto the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns, for the construction, maintenance, and operation of said railroad track.

The easement herein granted, however, shall terminate
505 whenever said Grantee, its successors and assigns, shall cease to use said lands for the purposes herein set forth.

In witness whereof the Grantors herein have hereunto set their hands and seals this 19th day of March 1908. Signed, Sealed, Acknowledged, Henry C. Thom, and delivered in presence of Julia G. Thom.

Isabella O. Beatty, John T. Brady, State of Illinois, County of Cook, ss.

Personally appear before me, the undersigned Notary Public in and for said county, the above-named Henry C. Thom and Julia G. Thom, his wife, and acknowledged the signing of the foregoing instrument, and that the same is the free act and deed of them and each of them.

In testimony whereof I hereunto set my name and affix my official seal at Chicago, Illinois this 19th day of March 1908.

Charles J. Tressler, Notary Public."

Exam. HADEN. Are there any further questions of Mr. Ford?

Mr. RYNDER. Yes.

By Mr. RYNDER:

Q. Mr. Ford, calling your attention to Exhibit 40 and the fact that is is signed by Swift & Company, per J. H. H., will you please state who is the person having the initials of J. H. H.?

A. J. H. Hurley.

506 Q. What is his position?

A. He is local traffic representative of the Swift & Company at Cleveland.

Q. Is he an officer of the company?

A. He is not.

Q. On the tariff eliminating the delivery of livestock on the private sidetrack of Swift & Company, I believe it became effective November 12, 1938?

A. I believe that is correct.

Q. In your Chicago office had you been notified of that change in the tariff prior to its effective date?

A. No.

Q. Is that the reason suspension was not asked at that time?

A. That is the reason.

Q. And that was just because somebody slipped up, I take it; failure to notify you of the change?

A. Just one of those changes that gets through without being brought to our attention.

Mr. RYNDER. That is all.

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Ford, I show you Exhibit 12 of record, will you please state what purpose is made by Swift & Company of the land and area shown on the exhibit encircled "26", lot Nos. 143 to 160, on Exhibit 12, indicated by Swift & Company; will you state for what purpose that property is now being used?

307 A. Well now, the buildings of Swift & Company, generally speaking, start at lots 154 and 261 and run north to and including what was known formerly as the Federal Packing Company, which runs up through 147 and 268.

By Mr. BAKER:

Q. May I suggest on Exhibit 13 you will see the location of the buildings and the lot numbers also.

A. That shows the lot numbers on the south, Mr. Examiner, but you have to go up to the end. It doesn't appear here. I was going to say to the end of the track, but it doesn't appear here. Our operation takes in the Federal Packing Company as shown on Exhibit 13, and it takes in what is shown as Swift & Company on Exhibit 13, and the other property south thereof is vacant property.

By Exam. HADEN:

Q. Where is "south thereof"?

A. Right here. In other words, from 154 to 261.

Q. On Exhibit 13?

A. Which are two lots shown on Exhibit 13 immediately adjoining our plant on the south; from thereon south through—well, to the track that goes across the property entering at lot 166 and circling northeast through 164, 252, 253, 254, 255, 256, and thence along the street. That area in there is entirely vacant property. Immediately adjoining our plant——

Q. Another packing plant adjoins that area?

A. That is our packing plant; that is Swift & Company. This Blumenstock & Reid Company, which was a packing house,
508 that has been taken down and additional pens were proposed, but not built.

Q. What direction is that?

A. This is east.

Q. To the east of that property crossing the track do you have another area there designated as Swift & Company; is that a packing plant?

A. That is the powerhouse for the packing plant, and these tracks receive coal and someone mentioned we had coal in this area west of 63rd and south of our plant. That is merely an emergency coal pile and is due to these conditions existing today. We have a coal pile on the side of the street by the powerhouse, but we keep an unusual coal supply on hand because of the emergency.

Q. Are all your packing facilities west of the tracks?

A. West of West 63rd Street.

Q. As shown on Exhibit 13?

A. Yes.

Exam. HADEN. That is all. Any further questions of Mr. Ford?

Cross-examination by Mr. PIERCE:

Q. I would like to ask you, Mr. Ford, when you speak of proposed pens and make reference to the area where the Blumenstock-Reid Building had been dismantled, if you have any plans of any proposed pens or anything, at that time where any such proposal was developed to such a point?

509 A. There was no point to our building those pens because the carriers refused to make delivery into our plant.

Q. There have been no pens built on Swift & Company's property except those pens adjacent to west 65th Street, which today are being measured by the engineers?

A. That is correct.

Mr. PIERCE. That is all.

Redirect examination by Mr. RYNDER:

Q. Mr. Ford, outside of there mere expenses of building pens, this is vacant ground belonging to Swift & Company on which a great many pens could be built, isn't it?

A. There is; all of those lots indicated in my previous statement in connection with Exhibit 13.

Q. In other words, there is ground for tremendous expansion of pens?

A. Yes.

Mr. RYNDER. I believe that is all.

Exam. HADEN. If there are no further questions, you may be excused. (Witness excused.)

Are there any other witnesses to testify?

(No response.)

Mr. Pierce, the second exhibit, Exhibit 51, has been received in evidence as well as No. 50, which you had just previously introduced.

Now gentlemen, this proceeding was reopened for
510 further hearing for the purpose of enabling the Commission to have a little more information before it in connection with a number of questions that were asked at the oral argument from the bench, and under those circumstances I am of the opinion that a proposed report will not be required.

There will be no proposed report issued.

I will set the brief date as the opening brief, as August 15, 1944, and the brief date of the opposing parties as of September 5, 1944, and the reply brief as of September 19, 1944.

Mr. PIERCE. Mr. Dobbins just suggested here that we were under the impression that you would entertain a suggestion for a proposed report, and naturally we were disappointed. We would like, if possible, to have a proposed report in this case, Mr. Examiner, there having been quite a number of items included here, which have not been covered by any oral argument, and would not be without the proposed report here. It seems to me that we ought to have a proposed report, as Mr. Rynder suggested, that it does narrow the issues when it gets before the Commission again and it will be narrowed down for them to consider, only about three items to consider.

Mr. RYNDER. I would like to very much join with Mr. Pierce in that suggestion. I think it is more than usually forced in this case because I think this case raises a lot of questions, at
511 least it is hard for me to find any authority on that.

Mr. BAKER. Mr. Examiner, I would like to join in the request for a proposed report, for the reason that some of the arguments presented by Mr. Rynder have been presented since the matter was considered by the Examiner before. I think it would be helpful to all of us if we had a proposed report, and the Examiner considering all of the issues before him now.

Exam. HADEN. Off the record, please.

(Discussion had off the record.)

Exam. HADEN. On the record.

Mr. DOBBINS. Mr. Examiner, I want to indicate that the Nickel Plate is joining with the New York Central with reference to a proposed report.

Exam. HADEN. I think Mr. Fitzpatrick, when he left, indicated he wanted a proposed report.

Mr. FARMER. We will make it unanimous.

Exam. HADEN. In view of the expressions of counsel, I believe it is necessary to modify my prior statement concerning the briefs, and to make this a proposed report case, and we will set the brief date as of August 15, 1944.

Now, is there anything further to come before us at this time?

Mr. PIERCE. Not from the railroad.

Exam. HADEN. If there is nothing further, the hearing is closed.

(Hearing concluded at 5:35 o'clock P. M.)

513 *Exhibit No. 2*

Rates and Charges published in this supplement are not subject to the Increases provided in Sup. No. 32

SUPPLEMENT No. 50

(Cancels Supplements Nos. ③38, ④40, 46, and 49) to Ill C. C. No. 1005, I. R. C. No. 2442, M. P. U. C. No. 885, Ohio No. 2932, I. C. C. No. 8785 (Supplements Nos. ①32, ②33, and 50 contain all changes from the original tariff that are effective on the date hereof).

BIG FOUR ROUTE

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY

(The New York Central Railroad Company, Lessee)

In connection with Louisville & Jeffersonville Bridge and Railroad Company, FX5, No. 9, F15, No. 2, and Other Carrier Parties to Tariff Named on Page 3 of Tariff as Amended

Supplement No. 50 (Cancels Supplements Nos. 41, 46, and 49) to Joint, Local, and Proportional Switching Tariff No. 1-N (Supplements Nos. ①32, ①33, ②33-A, ①34 and 50 contain all changes) Containing Switching Rates and Rules Governing Absorption of Switching, Trap Cars, and Transfer of Freight at Stations on The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Louisville & Jeffersonville Bridge and Railroad Company

Issued December 27, 1938. Effective January 28, 1939 (Except as otherwise provided herein).

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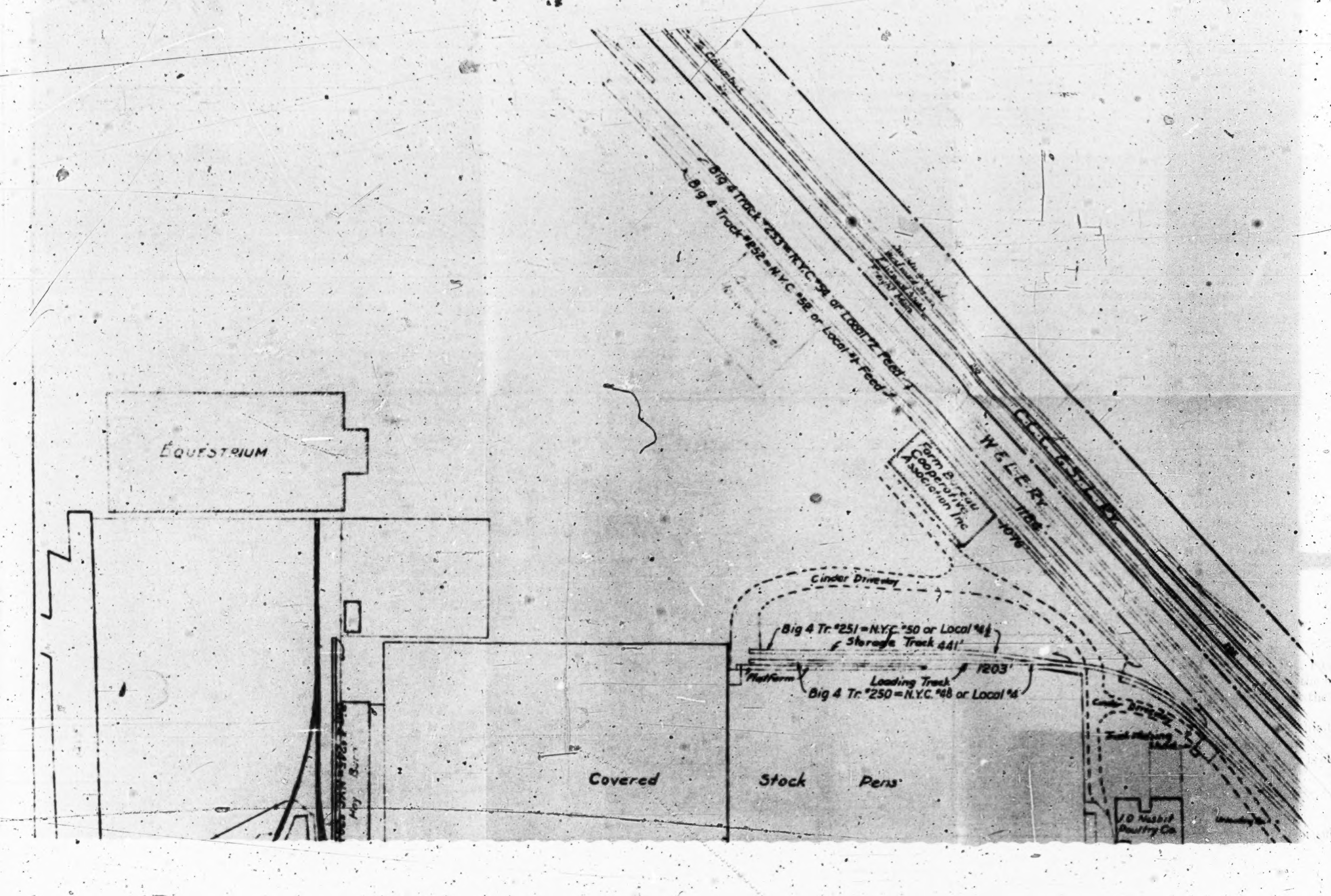
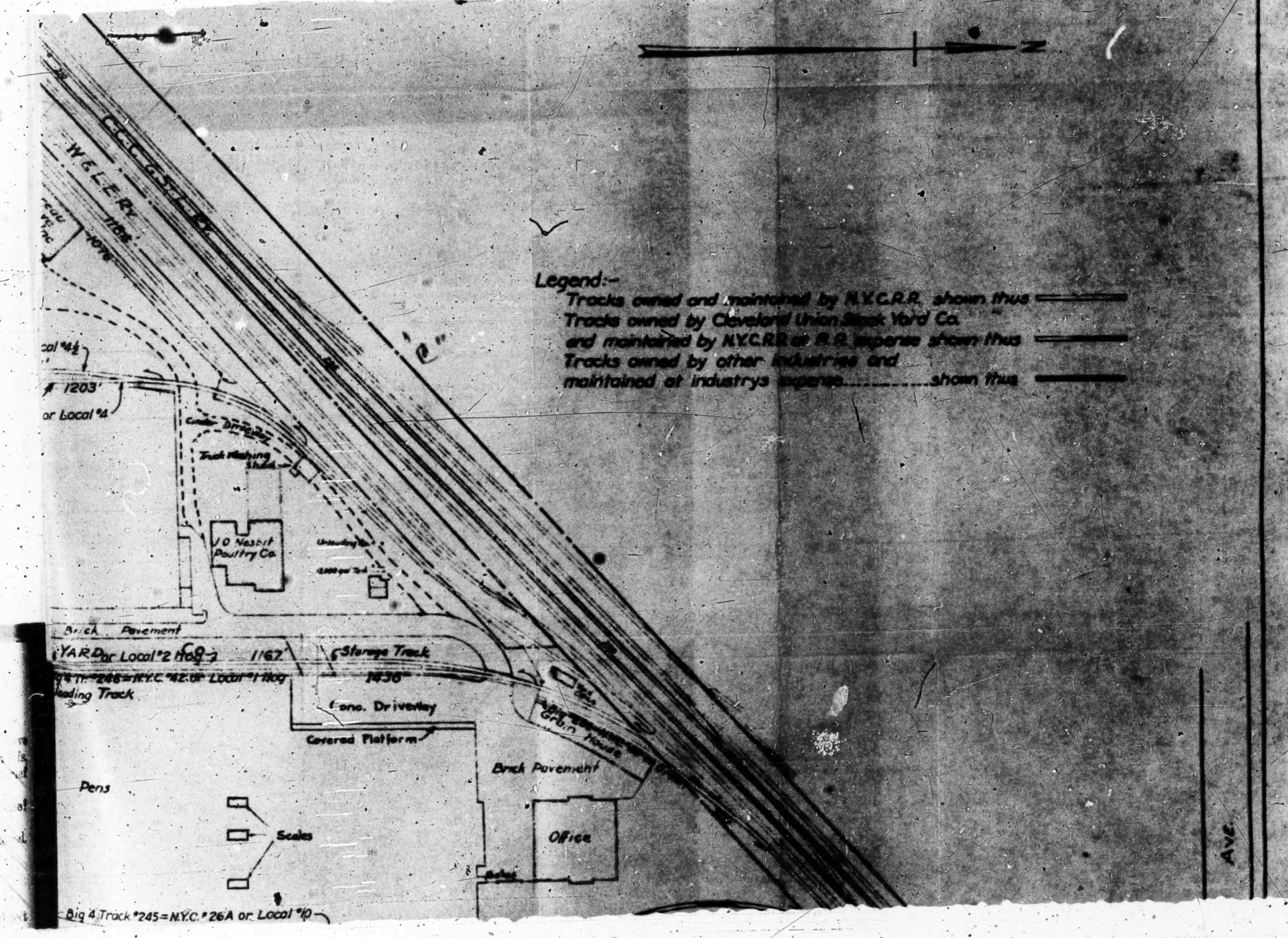
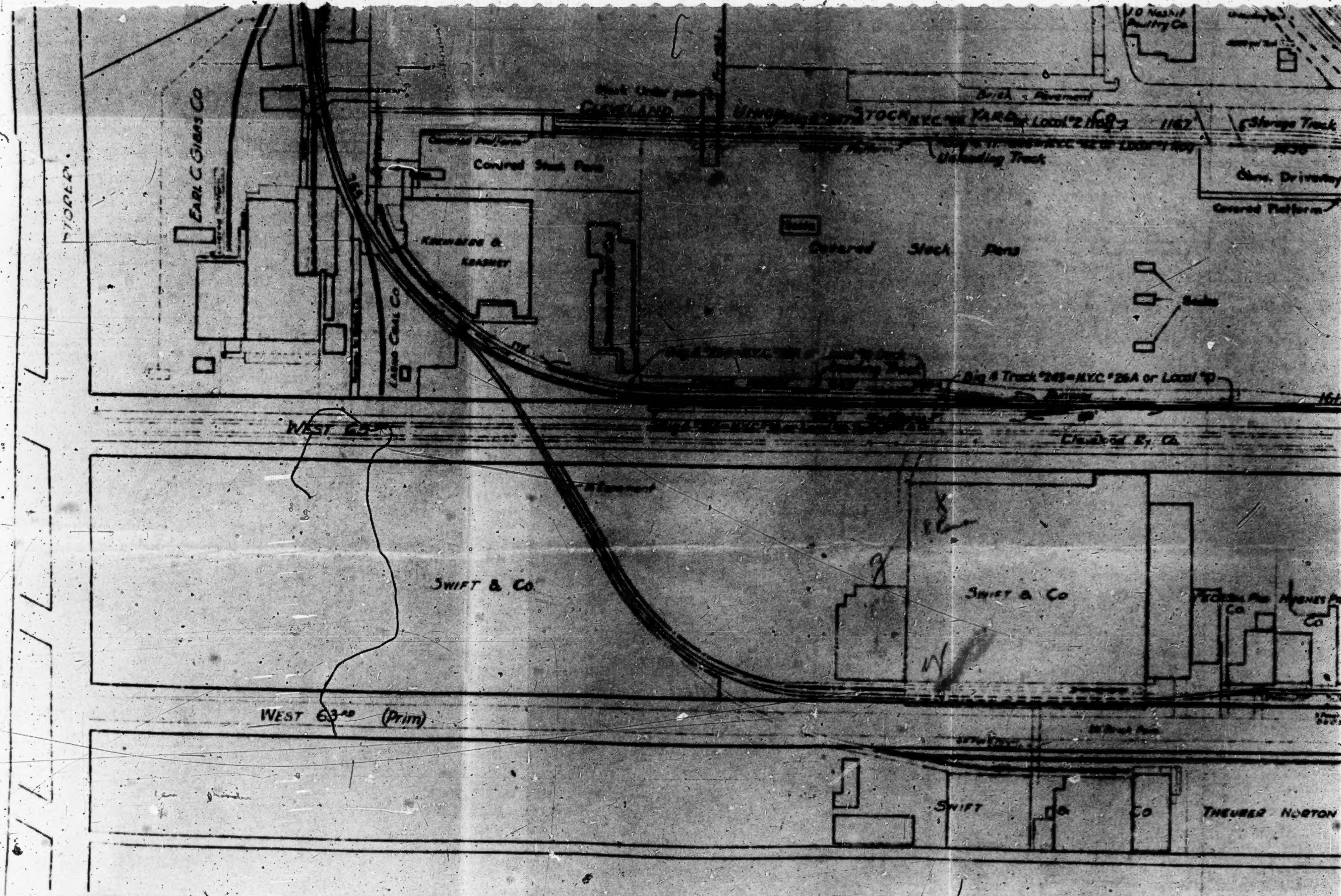
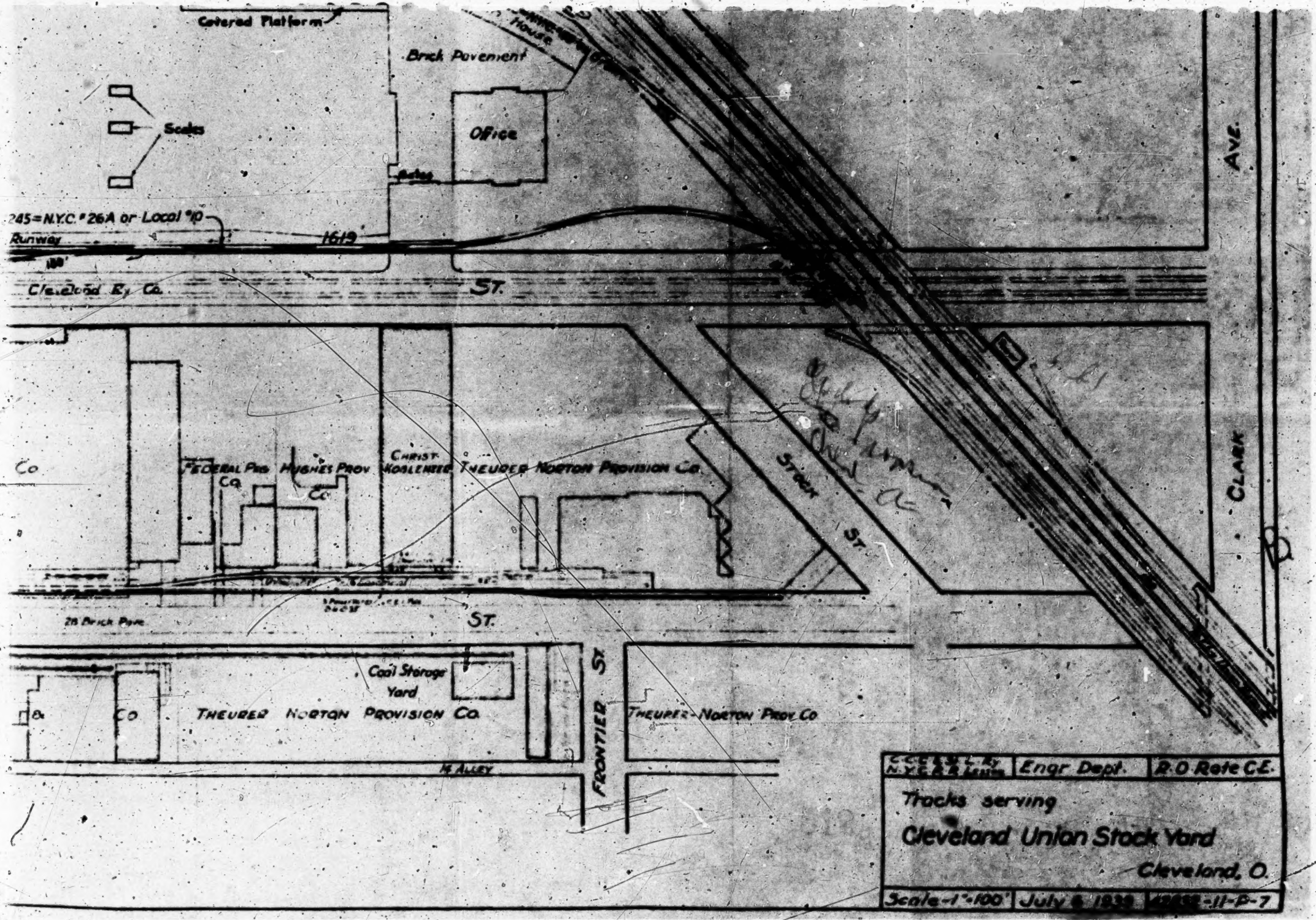
① Special Supplement (Ex Parte 123).
② Postponement Notice on Indiana Intrastate traffic. (Filed with I. R. C. only.)
③ Not filed with I. R. C. or Ill. C. C.
④ Filed with Ill. C. C. and I. R. C. only.


Big 4 Track #253 = N.Y.C. #54 or Local #2 Feed
Big 4 Track #252 = N.Y.C. #52 or Local #1 Feed
W. & L. E. Ry.
Farm Bureau Cooperative Association Inc
Equestrium
Cinder Driveway
Big 4 Tr. #251 = N.Y.C. #50 or Local #4
Storage Track 441'
1203'
Platform
Loading Track
Big 4 Tr. #250 = N.Y.C. #48 or Local #4
Covered
Stock
Pens
Hay Barn
J.D. Nesbit Poultry Co.


C.C.C. & St. L. Ry.
W.S.L.E. Ry.
Legend:-
Tracks owned and maintained by N.Y.C.R.R. shown thus
Tracks owned by Cleveland Union Stock Yard Co.
and maintained by N.Y.C.R.R. at R.R. expense shown thus
Tracks owned by other industries and
maintained at industrys expense.....shown thus
1203'
or Local "4
Truck Washing Shed
10 Nesbit Poultry Co.
Brick Pavement
YARD or Local "2 Hog
1167'
Storage Track
1438'
Loading Track
Conc. Driveway
Covered Platform
Brick Pavement
Pens
Scales
Office
Big 4 Track "245 = N.Y.C. "26A or Local "10
Ave.


EARL C GIBBS CO
Covered Platform
Covered Stock Pens
Brick Pavement
Storage Track
Unloading Track
Covered Stock Pens
Scales
Covered Platform
Big 4 Track 243 = N.Y.C. 26A or Local 10
WEST 63RD
Cleveland Ry. Co.
SWIFT & CO.
SWIFT & CO
WEST 63RD (Prim)
SWIFT
& CO
THEURER NORTON


Covered Platform
Brick Pavement
Scales
Office
245=N.Y.C. #26A or Local #10
Runway
1619
Cleveland Ry Co.
ST.
Co
Federal Pkg Co
Hughes Prov Co
Christ. Hoolehrer
Theurer Norton Provision Co.
Stone St.
Clark Ave.
ST.
Coal Storage Yard
Theurer Norton Provision Co.
Co
Theurer-Norton Prov Co
Frontier St
N. Alley
C.C.C.St.L.Ry
N.Y.C.R.R.Lines
Engr. Dept.
P.O. Rate C.E.
Tracks serving
Cleveland Union Stock Yard
Cleveland, O.
Scale-1"=100'
July 6 1939

The Tariff hereby amended will be further amended or reissued to provide specific publication of rates and charges increased under Ex Parte 123, effective on or before March 29, 1939.

Issued by Chas. Coughlin, Chief of Tariff Bureau, 466 Lexington Avenue, New York, N. Y.

Item No.	Applying at—	Application		
		Between		And points of interchange with B&O, Erie, NYC, NYC&StL (NFDist) PRR, W&LE
		Firm	Location	Rate per car (see exceptions in Item 1040)
1005-B Cancels ①1005-A	Cleveland, Ohio (20506-33)	Sherwin Williams Company	Upper Flats	$1.47
		Silberman Co., E. A., The	Lower Flats	3.47
		Simmons Co., The	Central Flats	3.47
		Sly Manufacturing Co., W. W., The	Lower Grade	3.47
		Smeed Box Co., The	Upper Flats	3.47
		Smith Facing Supply Co., The	Upper Flats	3.47
1010-B Cancels 1010-A		South West Coal Co. (Leisy Switch)	Lower Grade	6.47
		Standard Beef Co	Upper Grade	②2.47
		Standard Brewing Co., The	Lower Grade	3.47
		Standard Oil Company	Upper Grade	3.47
		Standard Slag Co	Central Flats	3.47
1015-C Cancels 1015-B	Switching Limits: From the Cleveland Short Line Connection at Linndale, Ohio, on the west to the termini of the tracks of the CCC&StL on the east.	Swift & Co	Upper Grade	②3.47
		Team Tracks	All	(See Item 1035)
		Theurer-Norton Provision Co., The	Upper Grade	②3.47
1020-A Cancels ①1020	The rates herein published to and from Industrial Tracks on the CCC&StL apply only to cars containing freight belonging to the rightful owner of the switch. Cars consigned to or loaded by other parties will be handled on the published Team Track rate, provided permission has been secured from the owner of the switch and the CCC&StL.	Unclaimed Freight Warehouse	Upper Flats	3.47
		U. S. Gypsum Co	Lower Flats	3.47
		‡United Supplies Co	Upper Grade	3.47
		Vulcan Coal Company	Lower Grade	3.47
		Wagner Co., F. C	Upper Flats	3.47
		Walsh Construction Co	Linndale	3.47
		Walsh Construction Co	Upper Grade	3.47
1035-B Cancels ①1035-A	①Will not apply on livestock.	Weber Hardware Stores	Linndale	3.47
		Weideman Co., The	River District	②3.47
		Wells Construction Co., J. A	River District	3.47
		West End Lumber Co	Linndale	4.47
		Whitaker-Glidden Co., The	Upper Grade	4.47

②Applies only on Coal and Material for Boiler House.

Canceled ⓒ1035-A		Williams Oil-O-Matic Co., The Williams Oil Stations, Inc.	Central Flats Lower Flats-Oil

ⓒApplies only on Coal and Material for Boiler House.

		Between—		And points of interchange with—	
				B&O, Erie, NYC&StL (NPDist) PRR, W&LE	NYC
		Team tracks	Location	Rate per ton of 2,000 or 2,240 pounds as rated	Rate per car (see exceptions in Item 1040)
ss 1035-A Cancels ⓒ1035		‡Team tracks	All		$3.47
		Team tracks	Central Flats	ⓒ42 cents	
		Team tracks	Lower Flats	ⓒ42 cents	

ⓒMinimum 25 tons, actual weight if in excess.
‡All Team tracks are open to the NYC. For specific team tracks open to other roads see specific tracks listed.

Clyde, Ohio
(20598-34)

Switching Limits:
North—From Freight Station one thousand (1,000) feet to Wm. A. Yeagle.
South—From Freight Station two thousand five hundred (2,500) feet to Gross Lumber Yard.

		Between—		And points of interchange with NYC, W&LE
ss 1075-A Cancels ⓒ1075		Firm	Business	Rate per car
		Clyde Mill Company	Flour Mill	$2.97
		Gross Lumber Company	Lumber and Cement	2.97
		Irving G. Fangboner Co., The	Grain and Salt	2.97
		Standard Oil Co.	Oil	2.97
		‡Team Tracks:	General	$2.97
		Trump, S. W.	Coal	2.97
		Yeagle, Wm. A.	Cement Blocks and Cement	2.97

‡Applies only to or from the NYC.

515 *Exhibit No. 3*

Rates and Charges published in this supplement are not subject to the increases provided in Sup. No. 32

SUPPLEMENT No. 67

(Cancels Supplement No. 65) to Ill. C. C. (C. C. C. & St. L.) No. 1005; I. R. C. (C. C. C. & St. L.) No. 2442; M. P. S. C. (C. C. C. & St. L.) No. 885; Ohio C. C. C. & St. L.) No. 2932; I. C. C. (C. C. C. & St. L.) No. 8785. (Supplements Nos. ③ A, ① 32, ② 33, 50, 61, 63, ④ 66, and 67 contain all changes from the original tariff that are effective on the date hereof.)

THE NEW YORK CENTRAL RAILROAD COMPANY

In connection with Louisville & Jeffersonville Bridge and Railroad Company (FX5, No. 9, F 15, No. 2) and other carriers parties to tariff named on page 3 of Tariff as amended.

SUPPLEMENT No. 67

(Cancels Supplement No. 65) to Joint, Local, and Proportional Switching Tariff No. 1-N. (Supplements Nos. ③ A, ① 32, ① 33, ② 33-A, ① 34, 50 61, 63, ④ 66, and 67 contain all changes) containing switching rates and rules governing absorption of switching trap cars, and transfer of freight at stations on The New York Central Railroad Company (Cleveland, Cincinnati, Chicago and St. Louis District) and Louisville & Jeffersonville Bridge and Railway Company.

Issued September 8, 1939. Effective October 11, 1939. (Except as otherwise provided herein.)

Departure from the terms of Rule 9 (e) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 164928 (corrected) of November 29, 1937.

Departure from the terms of Rule 9 (e) of Tariff No. 20 is authorized under permission of the Interstate Commerce Commission No. 167170 of March 12, 1938, as amended.

The Tariff hereby amended will be further amended or reissued to provide specific publication of rates and charges increased under Ex Parte 123, effective on or before March 29, 1940.

① Special Supplement (Ex Parte 123).

② Postponement Notice on Indiana Intrastate Traffic. (Filed with I. R. C. only).

③ Special Supplement filed only with M. P. S. C. and only changes "M. P. U. C." to read "M. P. S. C." (Blanket 463).

④ Special Supplement (Blanket 2).

Issued by Chas. Coughlin, Chief of Tariff Bureau, 466 Lexington Ave., New York, N. Y.

Participating Carriers

Most of participating carriers is as shown in Tariff as amended, except:

Abbreviation	Carrier	Concurrences							
		I. C. C.		III. C. C.		I. R. C.		M. P. S. C.	
		FX	No.	FX	No.	FI	No.	FM	No.
C. C. C. & St. L.	Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The (The New York Central Railroad Company, Lessee).	▲Eliminate. (Now N. Y. C. R. R.)							

Change in Name of Carrier

The Carrier shown in Column No. 2 below, by its adoption notice shown in Column No. 3 below, having taken over tariffs, etc., of the Carrier shown in Column No 1, below, the Carrier shown in Column No. 2, below, is hereby substituted for the Carrier shown in Column No. 1 below, wherever it appears in this tariff.

Column No. 1—Old carrier	Column No. 2—Adopting carrier	Column No. 3—Adoption notice, I. C. C. No.
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee).	The New York Central Railroad Company	1

Explanation of Abbreviations

Explanation of Abbreviations is as shown in tariff except:

Abbreviation	Explanation
N. Y. C. (C)	The New York Central Railroad (Cleveland, Cincinnati, Chicago and St. Louis District).

Explanation of Reference Marks

↓Reduction. ↑Add. ●No change in rate.
▲Changes in wording which results in neither increases nor reductions in charges.
Ⓐ As amended by Supplement No. 32.
Ⓑ Reissued from Sup. 64, effective September 17, 1939.
Ⓒ Reissued from Sup. 65, effective September 29, 1939.

Section No. 2

Item No.	Exceptions to rules governing absorption of connecting lines' terminal switching charges applying at stations indicated
	Applies at Cairo, Ill.
103-A Cancels 103	On each car of the following commodities, viz: Cottonseed, Cottonseed Products, Soya Beans and Soya Bean Products, which has been switched between industries at Cairo, Ill., and is subsequently reshipped via The C. C. C. & St. L. to points beyond Cairo, Ill., The C. C. C. & St. L. will absorb $3.47 of the switching charge assessed by The C. C. C. & St. L. or connecting lines, as the case may be, for movement to industry making reshipment, upon presentation of paid switching bill and evidence of reshipment via The C. C. C. & St. L. within six months of date of switching bill.
	Applies at Vincennes, Ind.
4446 (new)	On carload shipments of Grain and Products of Grain granted transit privileges under tariffs of inbound carriers at transit houses located on connecting lines, the N. Y. C. (C) will absorb the outbound switching charges from the transit house to the rails of the N. Y. C. (C) when such shipments are forwarded from Vincennes, Ind., via the N. Y. C. (C).

Section No. 3—Reciprocal Switching Rates

Item No.	Applying at—	Application		
		Between—		And point of interchange with C. I. P. R. R. (except as noted)
		Firm	Business	Rate per car
	Anderson, Ind. (20569-3)			
500-A Cancels (A) 500	**Switching Limits:** North.—From Passenger Station two and nine-tenths (2.9) miles. South.—From Passenger Station one and one-half (1½) miles. East.—From Passenger Station three-fourths (¾) mile. West.—From Passenger Station one and seventy-seven hundredths (1.77) miles.	Fadley & Son	Coal and Ice	(R) $3. 96
		Fisher, Thomas	Coal and Flour	(R) $3. 96
		Glaser Bros	Junk	(R) $3. 96
		‡Greer Steel Company	Steel	(R) $3. 96
		Hill Standard Manufacturing Co	Vehicle Manufacturers	(R) $3. 96
		Hoppes & Miller	Coal	(R) $3. 96

(R) Rate not to apply to or from point of interchange with P. R. R.

For Explanation of General Reference Marks, see above.

517

Exhibit No. 4

SWIFT & COMPANY
UNION STOCK YARDS, CHICAGO

Participant American Meat Institute Advertising and Sales Program

AUGUST 14, 1941.
A–18836

Mr. C. J. BRISTER,
Vice President, Freight Traffic,
New York Central System,
230 Park Avenue, New York, New York.

Mr. WALTER S. FRANKLIN,
Vice President in Charge of Traffic,
Pennsylvania Railroad,
Broad Street Station Building,
Philadelphia, Pennsylvania.

Mr. J. H. DAY,
Vice President,
The New York, Chicago and St. Louis Railroad Company,
The Terminal Tower, Cleveland, Ohio.

Mr. GEO. DURHAM,
Vice President and General Manager,
The Wheeling and Lake Erie Railway Company,
626 Huron Road, Cleveland, Ohio.

Mr. GOLDER SHUMATE,
Vice President, The Baltimore & Ohio Railroad Company,
Baltimore & Ohio Building,
Baltimore and Charles Streets,
Baltimore, Maryland.

Mr. CARL HOWE,
Vice President, Erie Railroad,
Hudson Terminal,
50 Church Street, New York, New York.

GENTLEMEN: Swift & Company operates a packing plant at Cleveland, Ohio, located upon the rails and having track connection with the New York Central Railroad Company, as identified in New York Central Railroad Tariff I. C. C. 8585.

In order to avoid the possibility of excess charges which may accrue if the livestock shipped to Cleveland, Ohio is delivered

by your lines at the Cleveland Union Stock Yards, Swift & Company will immediately bill all its shipments of livestock for Cleveland for delivery at its plant in Cleveland and you are requested to see that such delivery is made.

Yours very truly,

SWIFT & COMPANY.
W. A. Mayfield,
WAM

518 *Exhibit No. 5*

SEPTEMBER 27, 1941.

Mr. W. A. MAYFIELD,
Swift & Company,
Union Stock Yards, Chicago, Illinois.

DEAR SIR: Your letter of August 14th, File A–18836, addressed to the undersigned railroads jointly, sets forth that your packing plant at Cleveland has a track connection with the New York Central Railroad, and after stating that you will bill all your shipments of livestock for delivery at your plant in Cleveland, you request us to see that such delivery is made.

As you know, the railroads cannot make delivery of livestock at your plant without traversing a track owned by The Cleveland Union Stock Yards Company. We shall be glad to comply with your request when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until this consent is obtained by you, we will be unable to comply with your request.

Very truly yours,

W. S. FRANKLIN,
V. P., Pennsylvania Railroad.
GOLDER SHUMATE,
V. P., Baltimore & Ohio Railroad.
CARL HOWE,
V. P., Erie Railroad.
J. H. DAY,
V. P., The N. Y. C. & St. L. R. R. Co.
GEORGE DURHAM,
V. P. & G. M., The W. & L. E. Ry. Co.
C. J. BRISTER,
V. P., New York Central System.

519 *Exhibit No. 6*

G. A. A. Co.—9-40—40M
Printed in U. S. A.

(Uniform Live Stock Contract, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1939)

UNIFORM LIVE STOCK CONTRACT

This form of Contract to be used for Shipments of Live Stock and Wild Animals instead of Uniform Bill of Lading

DUPLICATE ORIGINAL—NOT NEGOTIABLE

THE NEW YORK CENTRAL RAILROAD COMPANY
(Cleveland, Cincinnati, Chicago & St. Louis District)
5260 Indianapolis, Ind., U. S. Yards, Station

SEPT. 24, 1941.

This Agreement, made this 24 day of Sept., 1941, by and between the C. C. C. & St. L. Ry. Co., The N. Y. C. R. R. Co., lessee, party of the first part, hereinafter called the carrier,* and Swift & Co., party of the second part, hereinafter called the shipper;

WHEREAS, The classifications and tariffs under which this agreement is made require that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "Ordinary Live Stock," specifying the kind or kinds of animals, or if not "Ordinary Live Stock" he must declare the kind and value of each animal, space for such declaration being provided below:

NOW, THEREFORE, This Agreement Witnesseth, that the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, except as noted, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road or on its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier* of all or any of said live stock over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be perfomed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to Swift & Co. Plant Delivery.
Destination Cleveland, State of Ohio.

Route NYC (C) (110/80) (143/144)
Car Initials and Numbers SLSX 71430 QLSX 6025.

ORDINARY LIVE STOCK

Ordinary live stock means all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any values be entered on this bill of lading.

36 Hour Release Executed

I (We) declare the shipment covered by this bill of lading to be ordinary live stock.

SWIFT & Co.
Shipper

OTHER THAN ORDINARY LIVE STOCK.

On shipments of live stock chiefly valuable for breeding, racing, show purposes, or other special uses, different rates of freight are in effect dependent on the valuation placed thereon by the shipper; which valuation may be the basic value as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be higher by the amount prescribed in the tariffs or classifications. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading and in no event shall the carrier be liable for any amount in excess of such valuation.

I (We) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered.

Shipper

NOTE.—The shipper shall execute one of the above declarations. Upon refusal of a shipper of other than ordinary live stock to declare the values of said stock for entry in this bill of lading the shipment will not be accepted for transportation under this contract. In the event the shipment consists of both ordinary live stock and other than ordinary live stock, both of such declarations shall be executed, but values shall be declared and entered on only the other than ordinary live stock.

Number and description of animals.	Shippers' declared value. (If on live stock chiefly valuable for breeding, racing, show purposes, or other special uses).	Weight (Subject to correction)	Rate of freight	
			Per 100 pounds	Per car
1/60 Ft. D. DK., Sheep 1/60 Ft. D. DK. 257 Sheep	Loaded 3:00 P.M. do	42,900	30	

SYC Rlsd. for slaughter.

Subject to Section 3 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

This shipment is tendered and received subject to the terms and conditions. _____

Signature of Consignor.

SWIFT & Co.

If charges are to be prepaid, write or stamp here, "To be prepaid."

Acknowledgement to be used if freight is prepaid.

T. M. Kautzman, Livestock Agt.

Received, $ _____, to apply in prepayment of the charges on the live stock described hereon.

Agent's signature.

_____

Agent or Cashier.

Per _____

(The Signature here acknowledges only the amount prepaid.)

Charges advanced, $3.30 RR SND BED

The C. C. C. & St. L. Ry., the N. Y. C. R. R. Co., lessee; T. M. Kautzman, Live Stock Agt.

Bq _____, Agent.

Witness my hand: Swift & Co., Shipper. By E. E. Brannon, Shipper's Agent. J. J. Whitehead, Witness.

*The word "carrier" is to be understood throughout this Contract as including any Person or Corporaton in possession of the Live Stock under the contract.

520 *Exhibit No. 7*

Reproduction of Appendix I, II, and III of the Interstate Commerce Commission's decision in Ex Parte 127, consisting of copies of letters between the Livestock Terminal Service Company and the New York Central Railroad Company. Also copy of an agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company.

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APPENDIX I

LIVESTOCK TERMINAL SERVICE COMPANY

3200 West 65th St.

CLEVELAND, OHIO

MAY 23RD, 1940.

The BALTIMORE & OHIO RAILROAD CO.
The ERIE RAILROAD COMPANY.
The NEW YORK CENTRAL RAILROAD CO.
The NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.
The PENNSYLVANIA RAILROAD COMPANY.
The WHEELING & LAKE ERIE RAILWAY COMPANY.

GENTLEMEN: In accordance with the understanding reached at yesterday's conference with representatives of railroads serving Cleveland, the offers of May 21 and 22, 1940, are withdrawn and the following offer is made:

This Company has obtained a license from The Cleveland Union Stock Yards Company to use suitable and necessary facilities and to engage in business as an independent contractor and furnish services heretofore furnished by The Cleveland Union Stock Yards Company in connection with the transportation and delivery of livestock shipped from or destined to, or while in transit at, the Cleveland Union Stock Yards, that are incumbent upon railroads under their published tariffs or as common carriers or warehousemen.

This Company offers to perform the following services under the terms and conditions and for the compensation hereinafter provided:

(a) Duly and promptly load into cars, and unload from cars upon arrival, all consignments of livestock which the railroad company shall desire to be handled at the Cleveland Union Stock Yards, and perform all services in respect of receipt, loading, unloading, handling, weighing, sorting, and care of such livestock, and delivery to consignee, that are incumbent upon the railroad company under its published tariffs, or as a common carrier or warehouseman.

(b) Promptly notify all consignees of the arrival of such livestock, preserve the identity of each separate consignment, make delivery to consignees, and obtain their receipts therefor.

(c) Perform clerical services specified in contract dated June 1, 1934, between The Cleveland Union Stock Yards Company and railroads serving Cleveland.

(d) Provide suitable facilities and service and wholesome feed and water for feeding, watering, resting, and caring for livestock while awaiting shipment or delivery to consignees.

(e) Comply with all applicable laws, rules, ordinances, and regulations, Federal, State, and Municipal, in the loading, unloading, handling, storage, care, watering, feeding, resting, and delivery of livestock.

(f) In the performance of such of these services as may be provided for in the published tariffs of the railroad company, this Company will act as agent of the railroad company in the performance of its obligation as a common carrier, except that this Company agrees to exercise due diligence in the performance of its duties under this agreement, and to indemnify, protect and save harmless the railroad against all loss or damage or expense on account of its failure to exercise such diligence. This Company shall be deemed to be in charge of and responsible for all livestock handled by it for said railroad under this agreement, as follows:

522 (a) On in-bound livestock, from the time car door is opened by employees of this Company until delivered to consignee; and

(b) On out-bound livestock, from the time such livestock is received for shipment until placed in cars and car doors closed.

Nothing herein contained shall increase the liability of the Livestock Terminal Service Company beyond that of warehouseman after the period when the railroad's liability as common carrier has ceased, or make this Company responsible for injuries to said livestock occasioned by the negligence of the railroad or its employees or agents other than the Livestock Terminal Service Company.

(g) Provide and keep provided at the Cleveland Union Stock Yards, suitable, adequate, and proper accommodations for the receipt, loading, unloading, weighing, care, handling, and delivery of livestock which the railroad company may desire to be received or discharged at the Cleveland Union Stock Yards in Cleveland, Ohio.

The compensation for the performance of the services herein offered shall be as set out below, and, except as provided in Items numbered 3 and 4, shall be paid or guaranteed to this company by the line haul railroad at the time such services are performed.

1. For services of receipt, loading, shipment, unloading, handling, and delivery to consignee, including storage for 24 hours:

(a) Livestock consigned to or from the public market conducted at the Cleveland Union Stock Yards, $2.50 per deck.

(b) Livestock consigned direct to packers and not offered for sale on the public market, $4.00 per deck.

(c) Other livestock shipped from or to the Cleveland Union Stock Yards, $0.50 per head.

2. For services in addition to the cost of the feed in connection with shipments stopped for feed, water, or rest to comply with the 28-hour law or other regulations:

(a) When fed in cars, $2.00 per deck.

(b) When loaded into suitable pens, fed, watered, rested 5 or more hours, and reloaded, $5.00 per deck.

3. For services required for the care of shipments, the charges for which shall be a lien against property in addition to charges in Items 1 and 2, and paid or guaranteed to this Company before release of property:

(a) Storage for each day or fraction thereof after the expiration of 24 hours after receipt from consignor for shipment or from the railroad company for delivery to consignee:

	Cents per head
Cattle	10
Calves	5
Hogs	3
Sheep	2

(b) Feeding to comply with State or Federal laws or regulations, or in accordance with instructions from owners, or humane practices while awaiting shipment or delivery to consignee will be charged for at the cost of feed delivered in pens.

4. For use hoof scale and weighing, to be paid by the per-
523 son requesting this service: Twenty cents per draft, minimum 25¢ per deck.

5. For miscellaneous services:

(a) Cleaning and disinfecting cars: (1) Single deck cars $2.50; (2) Double deck cars, $4.00.

(b) Bedding cars: $2.00 per deck for standard bedding, excess bedding supplied at a proportionate charge.

(c) Installation of partitions in cars: $1.00 for small partitions and $2.00 for large partitions, plus cost of material, subject to maximum of $3.50 per car.

(d) Tying bulls: 25¢ each, plus cost of rope.

(e) Miscellaneous services not specifically covered herein will be performed under special arrangements.

6. For clerical services referred to in paragraph (c), page 1, $400.00 per month as provided in contract dated June 1, 1934, between The Cleveland Union Stock Yards Company and the railroads serving Cleveland. The Livestock Terminal Service Company will obtain from The Cleveland Union Stock Yards Company an assignment of said contract, and the Cleveland railroads, parties to such contract, will consent to the assignment thereof.

It is not to be understood that the Livestock Terminal Service

Company, in taking an assignment of the said contract, in any way acknowledges that the payments thereunder are solely attributable to the clerical services which it will perform under this offer.

The Compensation to be paid by the railroad company to this Company for the performance of the services herein offered, is based upon the services which the railroad company is obliged to perform in respect to the receipt, loading, unloading, weighing, handling, sorting, care, accounting, and delivery of said livestock, as a carrier under its published tariffs, and is based upon the reasonable cost (plus a reasonable percentage for overhead, supervision, and profit) of the performance of such services and the rental of necessary and suitable facilities. In case of a change in the services required to be performed by the railroad company under its published tariff, or in case of a change in the reasonable cost to this company of the performance of the services so required to be performed for the railroad company, the rates of compensation may be changed to reflect such changed conditions.

The entire amount of such compensation will be retained by this Company, and no portion thereof will be paid directly or indirectly by it to any shipper or consignee of livestock handled at the Cleveland Union Stock Yards.

This Company is not interested as a shipper or consignee in any livestock in respect of which services are offered.

These services are offered beginning June 1, 1940, and this offer will be deemed a continuing offer until withdrawn and cancelled by thirty (30) days' notice in writing, or until superseded by an express contract between the railroad company and this Company.

524 This Company will at all times during the continuance of this offer cooperate with the railroad company in respect to the prompt loading and unloading of livestock into or from the cars placed by the railroad for that purpose, and will comply with such reasonable rules and regulations as may from time to time be established by the railroad company in that regard, to the intent that the operations of the railroad company may be facilitated and congestion avoided.

Yours truly,

LIVESTOCK TERMINAL SERVICE COMPANY,

(Signed) M. S. FARMER, *Secretary*.

MSF:W.

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APPENDIX H

THE NEW YORK CENTRAL RAILROAD COMPANY

F. F. Riefel, Assistant Vice President & General Manager.

CLEVELAND, May 28, 1940.
D-kb

LIVESTOCK TERMINAL SERVICE COMPANY,
3200 W. 65th St., Cleveland, Ohio.

GENTLEMEN: This acknowledges receipt of your offer of May 23, 1940, to perform services at the Cleveland Union Stock Yards upon shipments of livestock delivered to or shipped from said point over the lines of railroad of this company.

As a temporary arrangement, in order to prevent interruption of service in the handling of such livestock and pending decision by the Interstate Commerce Commission of the several controversies concerning receipt and delivery of livestock at Cleveland, Ohio, and more particularly, those involved in Dockets Nos. 28400 and 28421 now pending before the Interstate Commerce Commission at Washington, D. C., this company is willing to accept the proposal outlined in your letter with the qualifications hereinafter made.

It is understood that this acceptance of your proposal so qualified does not constitute an admission that this Company is obligated under its road-haul rates, its tariffs, or otherwise, to perform any or all of the services stated in your letter or to pay any or all of the compensation therein stated.

All rights to deny the obligations of this Company to perform any or all of such services, and to deny our liability for any and all of said compensation are expressly reserved.

Under the circumstances, payments in accordance with your proposal will be made under protest, subject to the qualifications and reservations above set out.

You are advised that this company, along with the other railroads serving Cleveland, Ohio, will take the position that the Livestock Terminal Service Co. in the performance of the services required to be performed by carriers under their tariffs and by the laws of the State of Ohio or of the Federal Government will do so as a common carrier subject to the provisions of the Interstate Commerce Act.

This company also reserves the right to terminate this agreement by giving to your company notice in writing of its intention so to do not less than thirty (30) days prior to the date set in said notice for such termination.

Yours very truly,

(Signed) F. F. RIEFEL,
Asst. Vice Pres. & General Manager.

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APPENDIX III

This Agreement, made and concluded this twenty-first day of May 1940, at Cleveland, Ohio, by and between The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards Company, and Livestock Terminal Service Company, hereinafter called the Service Company, both being corporations organized and existing under the laws of the State of Ohio, with their principal offices and places of business at Cleveland, in Cuyahoga County, Ohio;

Whereas, The Stock Yards Company was organized for the purpose of and is engaged primarily in the business of conducting and operating a public livestock market and furnishing stockyard facilities and services, which have been and are furnished in accordance with the provisions of the Packers and Stockyards Act, 1921, as amended, and

Whereas, The Stock Yards Company has used or permitted the use of certain of its facilities and has performed certain services under arrangements with the several railroads serving Cleveland, Ohio, in connection with the receipt, loading, unloading, handling, storage, and delivery to consignees of livestock shipped for, or destined to, or stopped in transit at the Cleveland Union Stock Yards operated by the Stock Yards Company, which services are considered to be and are defined as "transportation" by the Interstate Commerce Act; and

Whereas, The Stock Yards Company desires to confine its business to the conduct and operation of a public market for livestock and the furnishing of stockyards services within the meaning of the Packers & Stockyards Act, 1921, as amended; and desires to cease and discontinue furnishing transportation services within the meaning of the Interstate Commerce Act as amended, or other accessorial services required for the care, handling and storage of livestock while awaiting shipment or delivery to consignee; and

Whereas, The Service Company was organized for the purpose of furnishing, as an independent contractor, all services in connection with the handling of livestock shipped from or

527 to, or while in transit at, public stockyards, that are incumbent upon railroads under their published tariffs, or incumbent upon railroads as common carriers or warehousemen, including receipt, loading, unloading, handling, storage, and delivery to consignees; and desires to contract with the Stock Yards Company for the use of facilities heretofore used or as may from time to time be reasonably necessary for such purpose, and the right to engage in the business for which it was organized, and perform the services heretofore performed by the Stock Yards

Company in connection with the transportation and delivery to consignees of livestock at the Cleveland Union Stock Yards in Cleveland, Ohio; and

Whereas, The Stock Yards Company desires to enter into a contract with the Service Company for the efficient use of necessary and suitable facilities, the furnishing of reasonable services, and the economical employment of labor to the end that livestock shipped from or delivered to, or stopped in transit at, the Cleveland Union Stock Yards in Cleveland, Ohio, may be received, loaded, unloaded, handled, cared for, and delivered in a proper manner in accordance with the usage of this particular stockyard; now, therefore, this agreement witnesseth:

That the parties hereto, for and in consideration of the promises and agreements on the part of the parties respectively hereinafter contained, do covenant and agree with each other as follows:

I. The Stock Yards Company shall and does hereby agree to—

1. Provide and maintain necessary, suitable, and convenient faciilties for the handling of livestock while awaiting shipment or delivery to consignees, including loading and unloading platforms, chutes and alleys; holding and storage pens; feeding, watering, and resting facilities; weighing facilities; and alleys or other means whereby livestock may be received for shipment or removed by the consignee after delivery; Provided, however, That the Stock Yards Company shall not be required to provide any particular pen, alley, chute, or other facility, and may designate the facilities which are to be used, and which may at other times be used by the Stock Yards Company for other purposes.

2. Permit the use by the Service Company of such of the facilities of the Stock Yards Company as may be reasonable and necessary for the receiving from consignors, shipment, loading, unloading, care, handling, and storage while awaiting ship-
328 ment or delivery, and delivery to consignees, of all livestock shipped from or destined to, or stopped in transit at, or which the railroads may desire to have handled at the Cleveland Union Stock Yards in Cleveland, Ohio; and grant to the Service Company the right and privilege of engaging in the business of furnishing the aforesaid services at the Cleveland Union Stock Yards as agent of the several railroads serving Cleveland, it being understood that the Service Company shall not act as agent or employee of the Stock Yards Company in the performance of said services.

3. Provide and furnish the Service Company adequate and suitable office space and office furniture in the Livestock Exchange Building operated by the Stock Yards Company at 3200 West 65th Street in Cleveland; and provide and furnish customary

heating, lighting, electricity for ordinary office equipment, and janitor service, and one telephone extension from the switchboard of the Stock Yards Company to be used for local calls.

4. Furnish necessary lighting on loading and unloading platform, in alleys and pens to enable the Service Company to perform the services herein contemplated during times when artificial lighting is necessary.

5. Furnish, as required, wholesome water for watering all livestock held by the Service Company, for showering hogs while awaiting delivery or drenching hogs after loading preparatory to shipment, and for cleaning facilities.

6. Keep the facilities used by the Service Company in proper condition for the uses herein contemplated, make all necessary repairs, and clean and disinfect facilities when required by sanitary regulation; Provided, however, That the Service Company shall pay the Stock Yards Company the reasonable cost of cleaning and disinfecting chutes, alleys, or pens made necessary by the handling of diseased livestock.

7. Provide watchman services and insure all livestock while in the possession of the Service Company against all losses due to or resulting from fire, lightning, or tornado.

8. Furnish wholesome feed of suitable kind, and feed livestock upon orders from the Service Company, subject to the same rules and rates of charges as are currently applicable in connection with livestock received for sale upon the public market conducted by the Stock Yards Company.

9. Maintain suitable weighing facilities and, when requested by the Service Company, accurately weigh livestock shipments on the hoof and furnish the Service Company with duplicate copies of the scale tickets showing the weighing and identifying information.

10. Furnish accounting, clerical, or messenger service when, as, and if required by the Service Company, at rates of compensation to be mutually agreed upon from time to time, such services to be under the exclusive supervision and direction of the Service Company.

11. Supply skilled stockyard labor when, as or if requested by the Service Company to handle an unexpected or unusual volume of livestock at cost of labor plus 10% for overhead, such labor to be under the exclusive supervision and direction of the Service Company.

529 12. Utilize when, as, or if available and needed, the services of any of the personnel of the Service Company in order to keep operating expenses at a minimum, and compensate the Service Company for such services upon the basis of cost of similar services.

II. The Service Company shall and does hereby agree to—

1. Use the facilities provided and designated from time to time by the Stock Yards Company in a careful manner to avoid damage, and compensate and save harmless the Stock Yards Company from any loss or damage due to or resulting from the negligent or improper use of the facilities by the Service Company.

2. Perform the services contemplated herein in the customary manner and so as not to unduly interfere with the business of the public livestock market conducted by the Stock Yards Company, and save harmless the Stock Yards Company from any loss or damage due to or resulting from the negligent performance of the services herein contemplated in and upon the premises of the Stock Yards Company.

3. Conserve water, heat, electricity, cleaning, repairs, and use of facilities as much as reasonably possible consistent with reasonable service.

4. Provide and maintain, if and when required by the Stock Yards Company, surety bond or public liability insurance to adequately protect the Stock Yards Company from loss or damage due to or resulting from the performance or the failure to perform, or the manner of performance, by the Service Company of services herein contemplated.

5. Pay to the Stock Yards Company on or before the 10th day of each month as compensation for the use of facilities, the privilege of conducting its business, and the services furnished by the Stock Yards Company during the preceding calendar month, the following:

(a) For privilege of conducting business and the use of facilities:

(1) Each deck of livestock shipped from or to the public market by railroad, $2.00.

(2) Each deck of livestock consigned direct to packer and not offered for sale on the public market, $3.50.

(3) Each deck of livestock stopped for feed, water and rest, $1.00 when fed in cars: $3.00 when fed in pens.

(4) Each head of other livestock shipped from or to the stockyards, $0.25.

(5) Each deck or part thereof of livestock held in storage pens awaiting shipment or delivery longer than twenty-four (24) hours, exclusive of Sundays or legal holidays, $1.00 for each 24 hours or fraction thereof.

530 (b) Miscellaneous services furnished by the Stock Yards Company:

(1) Feeding—the charges applicable to market livestock.

(2) Weighing—twenty (20) cents per draft; minimum 50¢ per deck.

(3) Cleaning and disinfecting chutes, alleys, or pens made necessary by reason of the handling of diseased livestock—the reasonable cost of labor and material for such cleaning and disinfecting.

(4) Other services will be performed under special contracts.

III. The Stock Yards Company and the Service Company shall and do hereby agree that—

1. During the life of this agreement neither party shall interfere with or engage in a business similar to or competitive with the business of the other party.

2. The compensation provided herein may be changed as follows:

In case of a change in the services required to be performed by the Service Company under its contract with the railroads, or in case of a change in the character, extent, or value of facilities required, or in the reasonable cost to the Stock Yards Company of the performance of the services so required to be performed by the Service Company, the reasonable compensation for the use of facilities and the reasonable cost, plus a reasonable percentage for overhead, supervision, and profit, of the performance of these services shall be agreed upon by the President of the Service Company and by the President of the Stock Yards Company, and set forth in an amended or substituted schedule to be attached hereto.

Any disagreement between the Service Company and the Stock Yards Company as to the reasonable compensation for the use of facilities or cost of the performance of such service or as to the reasonable percentage for overhead, supervision or profit shall be determined by arbitration as hereinafter provided.

Matters requiring arbitration shall be submitted to the arbitrament of the officer in charge of the administration of the Packers and Stockyards Act, 1921, or a person designated and appointed by such officer. The party desiring such arbitration shall give written notice thereof to the other party, and to the officer in charge of the administration of the Packers and Stockyards Act, and shall state precisely the matter or matters which it is proposed to bring before the arbitrator. The other party may within ten (10) days after the receipt of such notice, also state additional matters subject to arbitration to be then arbitrated, such statement also to be in writing. Only matters so stated by the parties shall be considered or decided by the arbitrator.

531 The arbitrator, as soon as possible after such notice, shall meet with the President of the Stock Yards Company and the President of the Service Company to consider the questions submitted to him, and shall give to each party reasonable notice of the time and place of such meeting. After hearing both parties and taking such testimony and making further investigation as

he may see fit, the arbitrator shall make in writing his award upon the question or questions submitted to him, and shall serve a copy of such award upon each party, and the written award signed by such arbitrator shall be final and binding upon the parties hereto, and each shall promptly conform thereto.

The books and papers of both parties, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrator. All expenses shall be apportioned equally between the parties.

Until the arbitrator shall make his award upon the questions submitted to him, the business to be transacted under this agreement shall continue to be transacted in the manner and form existing prior to the arising of such questions.

Either party dissatisfied with the award of the arbitrator may, upon sixty (60) days' written notice, cancel and terminate this agreement.

3. This agreement shall continue until amended or cancelled by mutual agreement or until terminated by either party upon sixty (60) days' written notice to the other party.

In witness whereof, the parties have hereunto set their hands to duplicates hereof the day and year first above written.

THE CLEVELAND UNION STOCK YARDS COMPANY,
(Signed) A. Z. BAKER, *Its President.*
LIVESTOCK TERMINAL SERVICE COMPANY,
(Signed) C. B. HEINEMANN, *Its President.*

In the presence of
(Signed) PHILIP H. COAD.
(Signed) M. S. FARMER.

532 ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of April A. D. 1941

Ex Parte No. 127

Status of Public Stock Yard Companies

It appearing, that by order dated July 11, 1938, as amended, on August 4, 1939, and July 18, 1940, the Commission on its own motion instituted an investigation into and concerning the status of the public stockyard companies named in said orders and of Livestock Terminal Service Company and Fort Worth Livestock Handling Company, as common carriers by railroad subject to the Interstate Commerce Act, in respect of the transportation services performed at said stockyards, in connection with the unloading

and loading of carload shipments of livestock transported by railroad in interstate commerce to and from the public stockyards of certain stockyard companies; and the relations between said companies and (a) common carriers by railroad subject to the Act, and (b) any person, firm, or corporation receiving at or shipping from said stockyards livestock transported by railroad in interstate commerce to and from the said stockyards;

It further appearing, that a full investigation of the matters and things involved has been had, and that said stockyard companies and Livestock Terminal Service Company and Fort Worth Livestock Handling Company have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that St. Paul Union Stock Yards Company, West Philadelphia Stock Yard Company, Pittsburgh Joint Stock Yards Company, The Denver Union Stock Yard Company, Portland Union Stock Yards Company, Union Stock Yards Company of Seattle, South San Francisco Union Stockyards Company, San Francisco and Stockton, Calif., Los Angeles Union Stock Yards Company, The Cincinnati Union Stock Yard Company, Bourbon Stock Yard Company, The Jersey City Stock Yards Company, The Cleveland Union Stock Yards Company and Livestock Terminal Service Company, Union Stock Yard and Market Company, Incorporated, Fort Worth Livestock Handling Company, The New York Central Railroad Company, and the Michigan Central Railroad Company, be, and they are hereby notified and required to publish and file tariff schedules showing the charges assessed and collected for the loading and unloading of interstate shipments of livestock transported to and from the said public stockyards, on or before July 10, 1941, upon notice to this Commission and to the general public by not less than thirty days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act;

And it is further ordered, that this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

533 *Exhibit No. 8*

Reproduction of Exhibit 312 filed in Ex Parte 127, covering a lease agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company.

534 LEASE AGREEMENT

This Lease Agreement made at Cleveland, Ohio, this 31st day of May A. D. 1941, by and between The Cleveland Union Stock Yards Company, the Lessor, hereinafter called the Stock Yards Company, and Livestock Terminal Service Company, the Lessee, hereinafter called the Service Company, both corporations organized and existing under the laws of the State of Ohio with their principal offices and places of business in Cleveland, Cuyahoga County, Ohio; witnesseth that:

Whereas, the Stock Yards Company was organized for the purpose of, and is engaged primarily in the business of conducting and operating a public livestock market and furnishing stockyard facilities and services which have been and are furnished in accordance with the provisions of the Packers and Stockyards Act, 1921, as amended, and desires to confine its business to the conduct and operation of a public market for livestock and the furnishing of stockyard services within the meaning of the Packers and Stockyards Act, 1921, as amended; and

Whereas, the Service Company was organized for the purpose of furnishing, as an independent contractor all services in connection with the handling of livestock shipped from or to, or while in transit at, public stockyards that are incumbent upon railroads under their published tariffs, or as common carriers or warehousemen, including receipt, loading, unloading, handling, storage, and delivery to consignee; and desires to lease from the Stock Yards Company suitable and necessary facilities for such purpose, and to obtain the right to engage in business for which it was organized, and perform services in connectio with the receipt and delivery of carload shipments of livestock at the Cleveland Union Stock Yards in Cleveland, Ohio; and

535 Whereas, the Stock Yards Company owns certain land, platforms, chutes, pens, alleys, and driveways which are suitable and have been used for or in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock transported by railroad in carloads to or from the Cleveland Union Stock Yards in Cleveland, Ohio; and

Whereas, the railroads serving Cleveland, Ohio, have failed to provide suitable facilities or to perform the duty imposed by the Interstate Commerce Act in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock at Cleveland, Ohio; and have in the past employed the Stock Yards Company, and now employ the Service Company, to provide suitable facilities and perform the necessary services; and

Whereas, the Stock Yards Company is willing, and by this agreement proposes, to lease to the Service Company for its exclusive use and operation suitable facilities for the furnishing of services in connection with the receipt, loading, unloading, handling, care, storage, and delivery of livestock shipped from, to, or stopped in transit at, the Cleveland Union Stock Yards in Cleveland, Ohio.

Now, therefore, the parties hereto, for and in consideration of the promises and agreements on the part of the parties respectively hereinafter contained, do covenant and agree with each other as follows:

I. The Stock Yards Company does hereby let and lease unto the Service Company the premises situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being a part of the property of the Cleveland Union Stock Yards Company, situated on the westerly side of West 65th Street and along the southeasterly line of the right-of-way of the New York Central Railroad Company, and more particularly described and designated on a plat attached hereto and made a part hereof, showing in red the premises and facilities hereby leased; and the
336 Stock Yards Company also grants the use during the term of this lease of certain right-of-ways or easements over or through alleys and driveways designated and shown in yellow on said plat.

To have and to hold unto the Service Company for a term of one (1) year commencing on the 1st day of June 1941, and ending on the 31st day of May 1942, upon the covenants and agreements herein set forth.

II. The Service Company hereby covenants and agrees to—

(1) Pay to the Stock Yards Company as rent for said premises during said term, a sum of Eighteen Thousand Dollars ($18,000.00) per year, in monthly installments of Fifteen Hundred Dollars ($1,500.00) each, on or before the tenth day of each month during said term;

(2) Use said premises for the purpose of receiving from consignors, shipping, loading, unloading, care, feeding, watering, handling, storage, and delivery to consignees of carload shipments of livestock, and for no other purpose, it being specifically understood that said premises are not to be used, conducted, or operated as a public livestock market in competition with the public market conducted and operated by the Stock Yards Company;

(3) Maintain and keep said premises and appurtenances in good order and repair and in a reasonably clean, safe, and sanitary condition according to City, State, and Federal ordinances and laws, comply with the directions of the proper public officers

as to use, repair, maintenance, cleaning, and disinfection of such premises, and upon the expiration of this lease or its termination in any way, deliver up and surrender to the Stock Yards Company possession of the premises hereby leased in as good condi-
537 tion and repair as the same shall be at the commencement of said term, loss by fire and ordinary wear and decay only excepted;

(4) Use and occupy said premises and appurtenances in a careful, safe, and proper manner, and not allow said premises to be used for any purpose or in any way that will raise the rate of insurance thereon or increase the hazard of fire in or on said premises;

(5) Use said premises for the purposes contemplated, in a careful manner to avoid damage and undue interference with the business of the Stock Yards Company, and compensate and save harmless the Stock Yards Company for any loss or damage due to or resulting from the negligent or improper use of the facilities, or performance of services contemplated;

(6) Pay, in addition to rents herein specified, all water rents levied or charged against said premises during the term for which this lease is granted, and in case no water rents are levied or charged specifically against said premises, pay to the Stock Yards Company water rent at city rates for the amount of water used during such term, and also pay to the Stock Yards Company for all light, fuel, and power furnished during the term of this lease;

(7) Permit the Stock Yards Company to have free access to the premises at all reasonable times for the purpose of examining the same, or to make alterations or repairs to the buildings deemed necessary for safety or preservation, or the construction of additional sewer, water, electric lines, or other facilities;

(8) Not sublet said premises or any part thereof, or assign this lease, without first securing the written consent of the Stock Yards Company in each case;

538 (9) Allow the Stock Yards Company, if default be made in payment of said rent or any part thereof, or in fulfillment of any of the covenants or agreements herein specified to be fulfilled by the Service Company, or if any waste be committed or unnecessary damage done upon or to said premises, at any time while such default continues, or before the replacement or repair of such waste or damage, without notice, to declare the said term ended and enter into possession of said premises, and sue for and recover all rents and damages accrued or accruing under this lease or arising out of any violation thereof, or sue and recover without declaring this lease void or entering into possession of said premises.

III. The Stock Yards Company and the Service Company shall and do hereby agree that—

(1) During the term of this lease neither party shall interfere with or engage in a business similar to or competitive with the business of the other party;

(2) The rent provided herein may be changed as follows: In case of a material change in the reasonable value of the premises hereby leased, the reasonable rate of return, the amount of taxes assessed or other factors entering into the rent, or in the case of a material change in the extent or type of facilities necessary to perform reasonable service, a reasonable rent shall be agreed upon by the President of the Service Company and the President of the Stock Yards Company, and set forth in an amended or substituted schedule to be attached hereto. Any disagreement between the Service Company and the Stock Yards Company as to the reasonable rent shall be determined by arbitration as here-
339 inafter provided. Matters requiring arbitration shall be submitted to be arbitrament of the officer in charge of the administration of the Packers and Stockyards Act, 1921, or a person designated and appointed by such officer. The party desiring such arbitration shall give written notice thereof to the other party and to the officer in charge of the administration of the Packers and Stock Yards Act. He shall state precisely the matter or matters which it is proposed to bring before the arbitrator. The other party may within ten (10) days after the receipt of such notice also state additional matters subject to arbitration to be then arbitrated, such statement also to be in writing. Only matters so stated by the parties shall be considered or decided by the arbitrator. The arbitrator, as soon as possible after such notice, shall meet with the President of the Stock Yards Company and the President of the Service Company to consider the questions submitted to him, and shall give to each party reasonable notice of the time and place of such meeting. After hearing both parties and taking such testimony and making further investigation as he may see fit, the arbitrator shall make in writing his award upon the question or questions submitted to him, and shall serve a copy of such award upon each party, and the written award signed by such arbitrator shall be final and binding upon the parties hereto, and each party shall promptly conform thereto. The books and papers of both parties, so far as they relate to matters submitted to arbitration, shall be opened to the examination of the arbitrator. All expenses shall be apportioned equally between the parties. Until the arbitrator shall make his award upon the questions submitted to him, the rental prescribed herein shall be continued.

540 (3) This lease, upon expiration, shall be automatically extended by one year, from May 31st, 1942, and thereafter from year to year, unless either of the parties hereto shall, at least one month before such expiration date, give to the other notice in writing of the termination of the lease as of May 31st, 1942, or as of May 31st of any subsequent year.

(4) This lease agreement may be terminated, cancelled, and avoided at the option of either party in the event the railroads serving Cleveland terminate their contract or contracts with the Service Company and no longer employ the Service Company to perform services in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock at the Cleveland Union Stock Yards. Upon such termination, cancellation, and avoidance, both parties hereto shall be released from all obligations arising under this agreement except those which have accrued or arisen before the time and date of cancellation.

In witness whereof, the parties hereto by their respective officers have subscribed to duplicates hereof on the 31st day of May A. D. 1941.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER, *Its President.*
LIVESTOCK TERMINAL SERVICE COMPANY,
By C. B. HEINEMANN, *Its President.*

In the presence of
PHILIP H. COAD
M. S. FARMER

STATE OF OHIO,
Cuyahoga County.

Before me, A Notary Public in and for said County and State, personally appeared the above-named The Cleveland Union Stock Yards Company by A. Z. Baker, its President, who acknowledges that he did sign the foregoing instrument and that the same is the free act and deed of said corporation, and the free act and deed of such officer.

In witness whereof, I have hereunto set my hand and official seal at Cleveland, Ohio, this 31st day of May A. D. 1941.

J. P. CARPENTER, *Notary Public.*

541 *Exhibit No. 9*

(Sheet 1 of 4 sheets.)

CLEVELAND, OHIO,
January 25th, 1945.

By mutual consent of the parties and effective as of February 1st, 1935, the certain agreement dated June 16th, 1924, between The Cleveland, Cincinnati, Chicago & St. Louis Railway Company,

predecessor to The New York Central Railroad Company, lessee of the railroad and property of said Railway Company, and the Cleveland Union Stock Yards Company, relating to certain sidetracks at Cleveland, Ohio, located as shown on plan dated June 26th, 1924, attached to said agreement and made a part thereof, is hereby modified and amended to read, as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement, of any and all tracks or portions thereof belonging to the Industry and located on its land."

Signed by the parties in duplicate as of the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company.
By W. F. SCHAFF, *Vice President and General Manager.*
THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER, *President.*

W. N. K.

542 (Sheet 2 of 4 sheets.)

This Agreement, made and entered into in duplicate this sixteenth (16th) day of June 1924, by and between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, hereinafter called the "Railroad" and The Cleveland Union Stock Yards Company, a corporation, as Second Party, hereinafter called the "Industry"; witnesseth:

Whereas, said Industry and/or its predecessor company or companies entered into certain written agreements with said Railroad hereto respecting a large number of the tracks serving the Industry's plant at Cleveland, Cuyahoga County, Ohio, and

Whereas, is it the mutual desire to enter into a formal written agreement respecting certain of the tracks or portions thereof covered in two of the agreements already executed and also including certain portions of other tracks not heretofore covered by written agreement between the parties hereto.

Now, therefore, in consideration of One Dollar ($1.00) in hand paid by each party to the other, the receipt of which is hereby acknowledged, and of other valuable considerations, it is mutually agreed as follows:

First. That the blueprint hereto attached dated June 26, 1924, and made a part of this agreement, shows the system of tracks serving the Industry's plant at Cleveland, Cuyahoga County, Ohio, the tracks to be particularly covered by this agreement to include tracks Railroad's Valuation Numbers 245, 246, 247, 254, 255, and 256.

Second. The Railroad does and shall continue to own the following tracks and portions thereof.

(a) The southwesterly and westerly about 793-foot portion of Track No. 245 and also the 132-foot portion of said track from its point of switch in the Railroad's sidetrack to the Railroad right-of-way line.

(b) All of Track No. 246, about 1,624 feet in length.

(c) All of Track No. 247, about 1,359 feet in length.

543 (Sheet 3 of 4 sheets.)

(d) The southerly about 172-foot portion of Track No. 254.

(e) The southerly about 637 feet of Track No. 255.

(f) All of Track No. 256, about 357 feet in length.

Said tracks and portions of tracks are colored red on said blueprint.

Third. The Industry does and shall continue to own the following tracks or portions thereof.

(a) The about 1,619 feet of Track No. 245 extending from the Railroad right-of-way southwardly to the point of Big Four ownership in said track.

(b) The northerly about 649 feet of Track No. 254.

(c) The northerly about 180 feet of Track No. 255.

Said portions of tracks are colored green on said blueprint.

Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land.

Fifth. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated by the Railroad on said tracks, or in their vicinity for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage, or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said tracks; and if any claim or liability, other than from
544 fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.
(Sheet 4 of 4 sheets.)

Sixth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case, shall terminate thirty (30) days after such posting; after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated, as above provided, this agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns, of the parties hereto: Provided, however, That, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Seventh. This agreement shall cancel and entirely supersede the contract between the parties hereto dated May 10th, 1899, relating to portions of tracks numbers 245 and 254, as well as agreement of January 11th, 1905, relating to portions of Track 246 and 247.

In witness whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By (Sgd.) C. S. MILLARD, *General Manager.*

The CCC & St. L. Ry. Co.
Approved:
(Sgd.) H. N. QUIGLEY, *Gen'l Atty.*
(Sgd.) HADLEY BALDWIN, *Chief Engineer.*
(Sgd.) B. C. BYERS, *General Supt.*
(Sgd.) T. J. HAYES, *Superintendent.*

THE CLEVELAND UNION STOCKS YARDS COMPANY,
By (Sgd.) E. A. MURPHY, *President.*

Attest:
(Sgd.) ALLEN S. WALTZ, *Secretary.*

546 *Exhibit No. 10*

Explanation of Pages of Complainant's Exhibit

Page 1—Explanation.

Pages 2, 3, and 4.—Chronological statement of switching charges and reciprocal switching at Cleveland, Ohio, on CCC & St. L. (NYCRR lessee).

Page 5—Listing of packing houses appearing in CCC & St. L. (NYCRR lessee) current tariff located at Cleveland, Ohio.

547 Chronological Statement Showing Tariff Listing of People's Provision Co., People's Packing Co., and Swift & Co. as Industries on Cleveland, Cincinnati, Chicago and St. Louis R. R. or its Successor Company, New York Central Railroad

Date effective	Tariff	Industry shown
4-23-04	CCC & ST. L. 415, ICC 2153, $2.50 reciprocal switching	People's Provision Co.p.11.
7-27-07	CCC & ST. L. 47A and 62 ICC 3708, $2.50 reciprocal switching	People's Packing Co.
7-15-09	CCC & ST. L. 47B, ICC 4800, $2.50 reciprocal switching	People's Packing Co. grade.
7- 1-10	CCC & ST. L. 47C, ICC 5344, $2.50 reciprocal switching	Do.
4-15-11	CCC & ST. L. 47D, ICC 5695, $2.50 reciprocal switching	Do.
10- 1-11	CCC & ST. L. 1, ICC 5873, $2.50 reciprocal switching	Do.
7- 1-12	CCC & ST. L. 1-A, ICC 6034, $2.50 reciprocal switching	Do.
9- 1-14	CCC & ST. L. 1-B, ICC 6354, $2.50 reciprocal switching	Do.
548		
2- 2-15	Supplement 19 CCC & St. L 1-B, ICC 6354 $2.50 reciprocal switching.	Swift & Co., People's Packing Co, grade.
8- 1-16	CCC & St. L. 1-C, ICC 6739, $2.50 reciprocal switching	Do.
12-30-18	CCC & St. L. 1-D, ICC 7218, $2.50 reciprocal switching	Do.
8-26-20	CCC & St. L. 1-E, ICC 7526, $2.50 reciprocal switching	Do. [1]
10- 1-21	CCC & St. L. 1-F, ICC 7758, $2.50 reciprocal switching	Swift & Co. grade.
7-31-22	CCC & St. L. 1-G, ICC 7886, $2.50 reciprocal switching	Swift & Co. upper grade.
6-15-24	CCC & St. L. 1-H, ICC 8094, $2.50 reciprocal switching	Do.
12-25-25	CCC & St. L. 1-J, ICC 8289, $2.50 reciprocal switching	Do.
9- 5-27	CCC & St. L. 1-J, ICC 8385, $3.15 reciprocal switching	Do.
549		
11- 1-28	CCC & ST. L. 1-k, ICC 8450, $3.15 reciprocal switching	Do.
5-15-30	CCC & ST. L 1-L, ICC 8532, $3.15 reciprocal switching	Do.
11- 5-31	CCC & ST. L 1-M, ICC 8602, $3.15 reciprocal switching	Do.
11-30-36	CCC & ST. L 1-N, ICC 8785, $3.15 reciprocal switching	Do.
3-28-38	X123 reciprocal switching increased to $3.47	
11-12-38	Supplement 44 CCC & St. L. 1-N, ICC 8785, $3.47 reciprocal switching restricted to not apply on livestock. 5-18-44	Do. Do.
9-15-43	NYC RR 20, ICC 499, $3.47 reciprocal switching not applicable on live stock.	Swift & Co., NYC-C.

[1] People's Packing Co. eliminated effective 9-26-20.
Present—Same tariff and basis.